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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-731

Francis Snider, et al,

Petitioners,

v.

All State Administrators, Inc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD H. FRANK
500 Marine Bank Bldg.
Tampa, Florida 33601

COUNSEL
FOR PETITIONERS

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TO THE UNITED STATES COURT OF
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The petitioners, Francis Snider and Guy Ashcraft, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 3, 1973. The order denying rehearing, dated August 15, 1973, is set forth in the Appendix at p. 59.

OPINIONS BELOW

The district court's memorandum opinion entered on July 10, 1972, is set forth in the Appendix at pp. 1-33, infra. The district court's final order, entered on September 15, 1972, dismissing the cause for lack of subject matter jurisdiction after a trial upon the merits, is contained in the Appendix at pp. 34-35, infra. The opinion of the Court of Appeals is reported at 481 F.2d 387, and is set forth in the Appendix at pp. 45-57.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1973. A timely petition for re-

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hearing en banc was denied on August 15, 1973 and the instant petition seeking the issuance of a writ of certiorari was filed within 90 days from that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether Section 302(e) of the National Labor Relations Act, as amended, 29 U.S.C. Section 151, et seq., hereinafter referred to as the Act, confers upon district courts, in the absence of a congressionally imposed limitation, authority to exercise a full range of equity powers in securing and preserving employee interests arising under Section 302(c)(5) of the Act?

STATUTES INVOLVED

The statutory provisions involved are Section 302(e) and 302(c)(5) of the Act. The relevant provisions of the Act appear in the Appendix at pp. 36-38, infra.

STATEMENT OF THE CASE

The instant action was initiated in the United States District Court for the Middle District of Florida, Orlando Division, on October 23, 1969, by Francis Snider and Guy Ashcraft individually, as trustees, and as representatives of the class of persons who are the beneficiaries of a trust fund created pursuant to collective bargaining for the purpose of providing employees, their families and dependents with a fringe benefit in the form of health and welfare coverage. The trust

fund emerged as an immediate outgrowth of two collective bargaining agreements and it is specifically authorized by Section 302(c)(5) of the Act.

The district court's jurisdiction was invoked pursuant to Section 302(e) of the Act not merely to remedy the defalcation of monies entrusted pursuant to Section 302(c)(5) of the Act but equally importantly to cure malignancies bred into a trust estate through a scheme to create and control the underlying funds for personal gain.

The Factual Background

The relevant facts found by the district court and adopted by the court below may be summarized as follows:

During a period in late 1968 and early 1969 when collective bargaining negotiations were underway between Local 15 and a number of bricklaying, masonry, and plastering contractors in the central Florida area, Respondents George C. Stuart, President of a plaster contractors' association, Don Goad, the then Business Manager of Local 15, David W. Foley, a licensed insurance broker, organized several corporations for the purpose of admin-

istering union health and welfare trust funds.[1/] The corporations were organized in anticipation that the then current negotiations would result in the establishment of trust funds for which the Respondents Goad and Stuart, through their respective positions with Local 15 and employers, could control the selection of an administrator.

As a result of the negotiations, Local 15 and the employers' associations entered into two collective bargaining agreements, one covering the plasterers and the other bricklayers and cement masons, which provided that the employers would pay certain amounts per hour worked by employees

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[1/] The six corporations organized by the Respondents Stuart, Foley and Rhan are: All State Administrators, Inc., All State Administrators, Inc. of Orlando, All State Administrators, Inc. of Jacksonville, All State Administrators, Inc. of Miami, All State Administrators, Inc. of Tallahassee, and All State Administrators, Inc. of Tampa. The beneficial ownership of the stock in each of the "All State" corporations was divided among Respondents, Stuart, Foley, and Billie Jean Rhan, Respondent Goad's stepdaughter. A seventh corporation, Orange Services, Inc., was organized with the plan that it would eventually serve as a holding company for the other six. The stock of Orange Services, Inc. was held by Stuart, Rhan and John M. Tate, another insurance broker.

into a health and welfare fund to be established in accordance with Section 302(c)(5) of the Act.[2/]

Prior to the effective date of the collective bargaining agreements, Respondents Goad and Dickson became the two trustees to represent the employees. Stuart, without the concurrence of other employers, selected Respondents C. L. McCullough and W.S. Pyne, both former employees of Stuart's plastering company as trustees for the employers. The four trustees selected All State Administrators, Inc. as the administrator of the trust fund.

After All State took over administration of the trust fund, all monies contributed by the many employers were deposited in the name of All State and the expenses of both the trust fund and All State were paid out of the entrusted monies. Within a broad band of improper expenditures, All State paid out of the trust fund the cost and fees, including attorneys' fees, incident to the incorporation of itself, of the other five All State corporations

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2/ Both collective bargaining agreements were signed by Respondent Goad on behalf of Local 15. The plasterers' contract was signed on behalf of the employers by Respondent Stuart as President of the Plasterers Association, Inc., Orange, Osceola, Lake and Seminole counties. The separateness of a 302(c)(5) fringe benefit program from the labor organization achieving its existence through collective bargaining was acknowledged by the Court in Lewis v. Benedict Coal Corporation, 361 U.S. 459, 80 S.Ct. 489 (1960) and United States v. Ryan, 350 U.S. 299, 76 S.Ct. 400 (1956).

and of Orange Services, Inc. All State also used trust funds to pay premiums on life insurance for its officers, the Respondents Stuart and Foley, as well as travel and entertainment expenses unconnected with the purposes of the trust fund. A Flagrant abuse of trust funds was committed on January 29, 1969. All State not only rented a hospitality room at the Robert Meyer Hotel in Orlando, Florida, where a union meeting was being held, in an attempt to get additional business for itself as a fund administrator, but it stocked the room with liquor purchased with trust funds from a bar owned by Stuart. Trust funds were used to pay entertainment expenses incident to Goad's unsuccessful campaign for reelection as Business Manager of Local 15. In addition to the foregoing expenditures from the trust funds, which the courts below characterized as an improper diversion, All State, acting through Foley, executed a lease with its President, George C. Stuart, for office space in the building owned by Stuart and occupied by Stuart's plastering company and paid the rent under the lease out of the trust fund. A number of other expenses associated with Stuart's premises and his plastering business were also paid from the trust fund, e.g., electric bills, intercom repairs, cleaning and clerical help.

Simultaneously with the selection of All State as the Administrator of the trust fund, the trustees signed an agreement, procured by Stuart and Foley, with Aetna Life & Casualty Company to provide the health and welfare coverage. The policy was placed through an Aetna agent, John M. Tate, a stockholder in Orange Services, Inc. Tate agreed

to rebate, and periodically rebates, 70% of his commission from Aetna to Respondent Foley, a stockholder, officer and a moving party in the organization of the All State family.

Goad's pecuniary gain from the scheme was insured by the presence of his stepdaughter, the Respondent Rhan, as one of the officers in each of the corporations. Rhan at all times material to this proceeding has lived in Silver Spring, Maryland, 1000 miles from Orlando, Florida. She contributed neither effort nor money to the establishment of the corporate entities. It is not disputed and the district court found that the Respondents Stuart, Goad, Foley and Rhan, in contemplation of the collective bargaining agreements containing provisions for the establishment of an employee fringe benefit program, "evidently anticipating the financial advantages that might be gained from the administration of such fund, set up the machinery for acquiring the control and management of the Fund."

As a result of employee outrage inspired by the Respondents' corruption of their trust fund, Goad and Dickson were removed as employee trustees and they were replaced by Francis Snider and Guy Ashcraft. Following an audit of the trust funds, Snider and Ashcraft initiated the present action.

Notwithstanding a factual backdrop fully disclosing that the Respondents successfully perverted Section 302(c)(5) of the Act into a tool for self-gain, the district court and the court below perceived Section 302(e)'s jurisdictional sweep as

encompassing only the prohibition of future wrongdoing. It is noteworthy that within three days following September 15, 1972, the date when the district court's order became final, Stuart, Foley and Rhan extracted in excess of $78,000 from the trust estate without any prior notice to, consultation with, or authority from any person acting in the capacity of a statutory trustee.[3/] As of the date this petition is filed, it is known that monies approximating the sum of $100,000 have been unlawfully extracted from the trust estate with apparent impunity and recently appointed, properly authorized trustees have not been able to gain possession from the Respondents of the funds, books and records owned by and associated with the trust. It is paradoxical that although the courts below have spoken in terms of future injunctive relief being awardable under Section 302 (e), permanent relief, effective only in futuro, has never been awarded the Petitioners. Indeed, the Respondents are presently holding the funds, books and records of the trust hostage for the payment of a "fee" in spite of their many defalcations and the uncontroverted fact that trust assets alone are even presently financing their personal venture. Hence, the assertion by the Court below that the passage of time has mooted aspects of this matter is wholly unwarranted.

3/ By reason of Rule 62(e) of the Federal Rules of Civil Procedure the district court's order of dismissal, which was not stayed until October 18, 1972, dissolved the preliminary injunction entered on November 4, 1969.

I

REASONS FOR GRANTING THE WRIT

A.

The Decision Below Conflicts With A Decision Of The Sixth Circuit, Ignores A Decision Of The First Circuit And Adopts Dicta Expressed By The Seventh Circuit.

The questions of equitable power granted to the district courts and the remedy which may be accorded pursuant to Section 302(e) of the Act have been left unsettled and ill-defined since that Section's enactment in 1947.[4/]

The court below acknowledged that the question as to the jurisdictional breadth of Section 302(e) of the Act was one of first impression in that Circuit. The jurisdictional sweep accorded Section

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4/ The confusion and uncertainty surrounding the meaning of Section 302(e) of the Act are demonstrated by the following district court decisions: Giordani v. Hoffman, 295 F.Supp 463 (E.D. Pa. 1969); Porter v. Teamsters Funds, 321 F.Supp. 102 (E.D. Pa. 1970); Pidgeon v. Brunswick Port Authority, 324 F.Supp. 140 (S.D. Ga. 1971); Insley v. Joyce, 330 F.Supp. 1228 (N.D. Ill. 1971); and Fiorelli v. Kelewer, 339 F.Supp. 796 (E.D. Pa. 1972).

302(e) of the Act by the Fifth Circuit is in conflict with equally conflicting interpretations of Section 302(e) enunciated by the First and Sixth Circuits. The determination reached by the Fifth Circuit in the present proceeding appears to be patterned after dicta expressed by the Seventh Circuit in Employing Plasterers Association v. Journeymen Plasterers, 279 F.2d 92 (C.A.7, 1960), i.e. Section 302(e) of the Act empowers district courts injunctively to prohibit only future wrongdoing and does not authorize an extensive exercise of equity jurisdiction. Thus, the court below rejected the comprehensive jurisdictional grant enunciated by the Sixth Circuit in Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (C.A. 6, 1962), as well as the "structural violation" test established by the First Circuit in Bowers v. Ulpiano Casal, Inc., 393 F.2d 421 (C.A.1, 1968).

The instant petition presents the Court with its first opportunity fully to mark the boundaries of Section 302(e). We submit that the view of Section 302(e) of the Act adopted by the Sixth Circuit in Lewis, supra, comports with a congressional purpose to embed within the word "restrain" as used in Section 302(e) of the Act a grant of judicial authority of no lesser magnitude than that which has been measured by the word "restrain" as it is used in Sections 4 and 9 of the Sherman Antitrust Act, 15 U.S.C., Section 1, et seq. United States v. National Lead Co., 332 U.S. 319, 334, 67 S.Ct. 1634, 1641 (1947); De Beers Consol Mines v. U.S., 325 U.S. 212, 218-219, 65 S.Ct. 1130, 1133 (1945); See also, Wirtz v. Milton, 416 F.2d 1071 (C.A.9, 1969) [Fair Labor Standards Act, 29 U.S.C. §217] and Securities and Exchange Commission v. Barraco, 438 F.2d 97 (C.A.10, 1971) [Securities Exchange Act of 1934, 15 U.S.C. §78 u (3)].

Moreover, to confine the word "restrain" in the manner suggested by the Seventh Circuit in Employing Plasterers, supra, and as adopted by the Fifth Circuit as determinative of the instant case, does violence to the well settled principle uttered by this Court in Porter v. Warner Holding Company, 327 U.S. 395, 66 S.Ct. 1086 (1949) that:

> "*** The comprehensiveness of ** equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapeable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." (p. 398, 1089).

As we have noted, the court's dicta in Employing Plasterers, supra, seemingly adopted by the court below in the instant case as the controlling principle, results in the anomaly that a claim asserted under Section 302(e) of the Act must be fractionalized between a federal and a state court. Hence, the federal judiciary would restrain future encroachments upon existent trust funds and the state courts would be charged with the responsibility of reconstructing and protecting employee trust funds created pursuant to Section 302(c)(5) of the Act. We find such result incompatible with the fact that it is a federal statute which gives breath to the trust fund and prescribes the manner in which the fringe benefit program is to be created. We underscore in this regard that as of January 1,

1973, there were 178,670 welfare and pension plans in existence, wholly by reason of Section 302(c)(5) of the Act, which were subject as well to the Welfare and Pension Plans Disclosure Act, 29 U.S.C. Section 301, et seq.[5/] In the face of legislative authority permitting and supporting such employee fringe benefit plans, and the extent to which the federal grant has been utilized, it cannot be gainsaid that "** the policy of the law is so dominated by the sweep of the federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." Unarco Industries, Inc. v. Kelly Company, 465 F.2d 1303, 1306 (C.A.7, 1972). The denial of a comprehensive federal remedy in vindication of wrongs perpetrated through the advantage of a federal statute is not consistent with the duty of a court to be alert to provide such remedies as are necessary to make effective the congressional purpose. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 63 S.Ct. 172 (1942). Here, no less than in the circumstance where a federal statute condemns an act,

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[5/] See Appendix at pp. 39-44, infra, and a publication issued by the United States Department of Labor, Labor-Management Services Administration, entitled "Characteristics of 178,670 Plans on File January 1, 1973 Under the Welfare and Pension Plans Disclosure Act".

> "** the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions the answers to which are to be derived from the statute and the federal policy which it has adopted." Id. at 176, 174.

B.

This Court's Decision in Arroyo v. United States, 359 U.S. 419, 79 S.Ct. 864 (1959), Has Been A Source Of Error In The Construction And Application Of Section 302(e) Of The Act.

The court below characterized this Court's decision in Arroyo as supportive of the proposition "*** that breaches of fiduciary duty by trustees and administrators of union welfare funds constitute violations of state law governing the management of trust property." 481 F.2d at p. 391. The origin of the mistaken notion seems to derive from the Court's observation in Arroyo that:

> "The legislative history [of Section 302(e) of the Act] is devoid of any suggestion that defalcating trustees were to be

held accountable under federal law, except by way of the injunctive remedy provided in that subsection." 359 U.S. 427, 79 S.Ct. 864. 6/

The First Circuit in Bowers, supra, at footnote 5, 393 F.2d 424, demonstrated its disagreement with the Sixth Circuit's view of Section 302(e) jurisdiction by pointing up that it did "*** not draw from Arroyo, as apparently the court did in Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (C.A.6, 1962) **, the authority for saying that Section 302(e) permits the use 'of whatever equitable remedies may be needed to command obedience, by the trustees to their contractual and statutory obligations'." 7/

6/ The Court determined in Arroyo that the criminal sanctions contained in Section 302(b) and (d) could not be imposed upon defalcating trustees. In response to the Arroyo decision, Congress, in 1962, enacted 18 U.S.C. Section 664, which condemns as a criminal act the conversion, abstraction or embezzlement of funds subject to administration under Section 302(c)(5) of the Act.

7/ The relevance of Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 82 S.Ct. 1328 (1962), to the determination reached in Bowers is in our view of little if any significance in determining the correct construction of Section 302(e). In Bowers, the recapture of questionable expenditures was mistakenly sought under Section 301 of the Act. Moreover, the claim in Bowers, based upon the jurisdiction bestowed by Section 302(e) of the Act was asserted against third persons wholly unrelated to either the collective bargaining relationship or the fringe benefit plan.

In sum, we believe the confusion surrounding the operative value of Section 302(e) of the Act as a device for remedying not only the defalcation of monies entrusted pursuant to Section 302(c) of the Act but also the deceitful exploitation of that Section of the Act will be eradicated by amplification of the Court's expression in Arroyo that defalcating trustees were not "to be held accountable under federal law, except by the way of the injunctive remedy provided in that subsection." 359 U.S. 417, 79 S.Ct. 869.[8/]

C.

The Construction Given Section 302(e) Of The Act By The Sixth Circuit in Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (1962), Fits Within The Federal Right-Remedy Doctrine.

The development of the concept that power of the district courts conferred by Section 302(e) of the Act is limited to relief regulating only future behavior can hardly be said to be grounded upon

8/ The legislative history of Section 302, alluded to in Arroyo, emphasizes a congressional purpose to shield 302(c)(5) trust funds fron the control of union officers for political purpose and personal gain. We signal the Court's attention to the fact that the former Business Manager, Respondent Goad, interposed his stepdaughter, the Respondent Rhan, in the corporate scheme as the conduit through which he would unlawfully benefit from the administration of the fringe benefit program which he participated in creating.

express statutory language or a stated congressional purpose. There can be no doubt that implicit in congressional action in the area of collectively bargained employee trust funds is an underlying purpose to commit the trust estate to statutory purposes and to prevent its conversion to personal use. Hence, we believe here, no less than that which the Court commanded in J.I. Case Company v. Borak, 377 U.S. 426, 84 S.Ct. 1555 (1964), "** it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." And -

> "It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done'." Id. at p. 433, 1560.

The compulsion of Borak enables a construction of Section 302(e) of the Act upon which to award the full range of remedies sought by the Petitioners but denied by the courts below. See also Leedom v. Kyne, 358 U.S. 184, 189-191, 79 S.Ct. 180, 184-185 (1958).

We assert that the Petitioners' ultimate objective, the judicial restructuring of the trust fund in a manner and to a degree comporting with Section 302(c)(5) of the Act, the recovery of defalcated monies, the award of attorney's fees and costs expended by the Petitioners to preserve and protect the trust estate, consistent with elementary trust principles, was well within the boundaries of the district court's general equity power as such power was most recently characterized in Swann v. Charlotte - Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971):

> "Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> > 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'

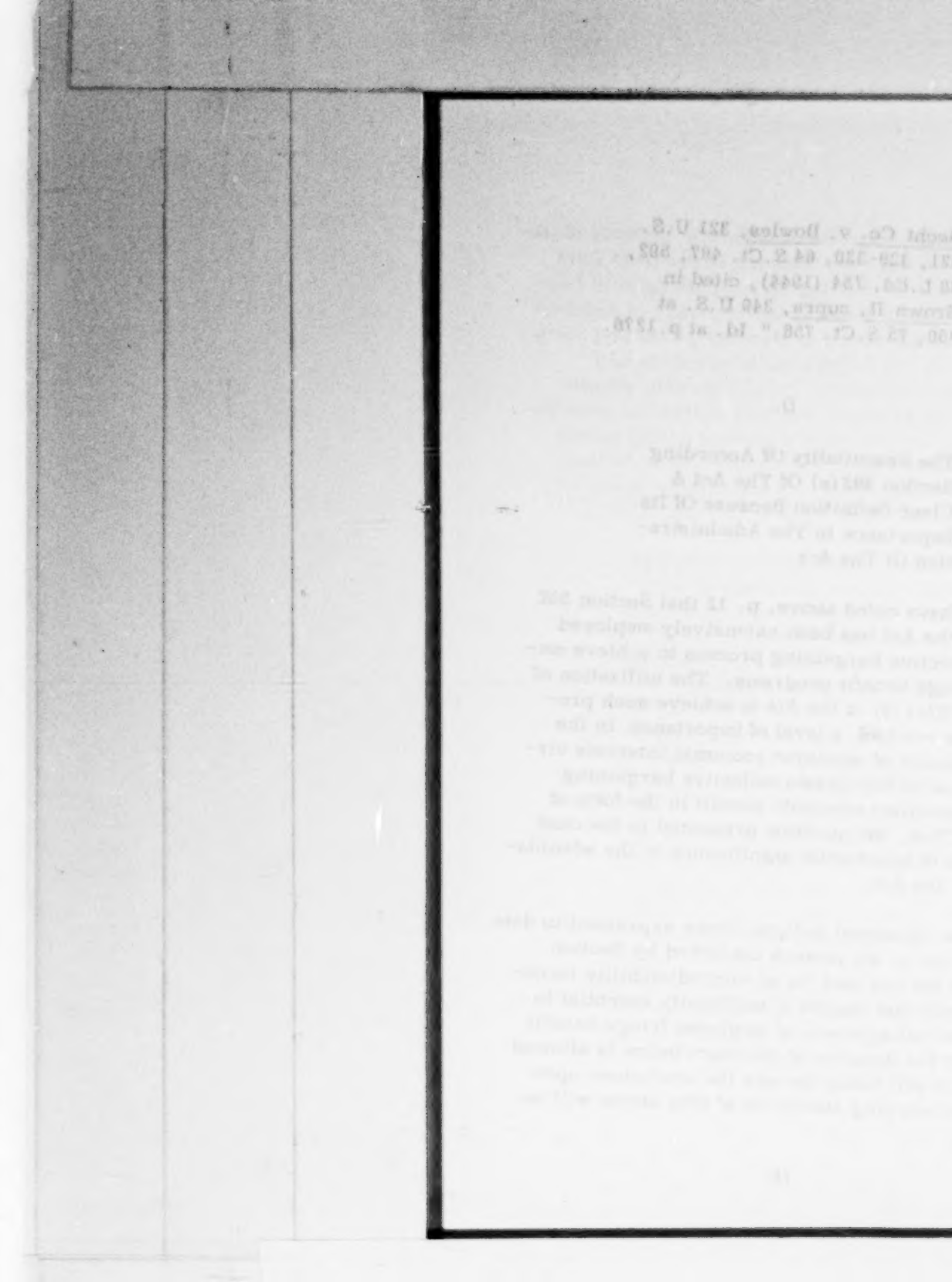
Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S.Ct. 487, 592, 88 L.Ed. 754 (1944), cited in Brown II, supra, 349 U.S. at 300, 75 S.Ct. 756." Id. at p.1276.

D.

The Essentiality Of According Section 302(e) Of The Act A Clear Definition Because Of Its Importance In The Administration Of The Act.

We have noted above, p. 12 that Section 302(c)(5) of the Act has been extensively employed in the collective bargaining process to achieve employee fringe benefit programs. The utilization of Section 302(c)(5) of the Act to achieve such programs has reached a level of importance in the accommodation of employee economic interests virtually equal to the classic collective bargaining goal of immediate economic benefit in the form of wages. Thus, the question presented in the case at hand is of substantial significance in the administration of the Act.

The divergent judicial views expressed to date with respect to the powers conferred by Section 302(e) of the Act lead to an unpredictability inconsistent with that degree of uniformity essential to congressional approval of employee fringe benefit plans. If the decision of the court below is allowed to stand it will likely become the touchstone upon which the varying standards of fifty states will be



imported into a significant aspect of the regulatory scheme prescribed by the Act. Indeed, the decision of the court below, within the factual context of the events challenged by the Petitioners, well could serve as a beacon for others who harbor instincts to employ Section 302(c)(5) of the Act for personal benefit.

Alternatively, Section 302(e) of the Act may well be obliterated by the forced choice between limited federal relief and a more expansive state remedy. For plainly, if Section 302(e) means that which the court below says it means, wrongdoing may be enjoyed to the moment of discovery then only to be enjoined as to the future leaving to the party seeking to correct the evil the unrealistic burden of remedying the past wrongs before a state tribunal. It is manifest that such a construction of Section 302(e) of the Act not only imposes an extraordinary onus upon the party seeking to protect the trust, but also exposes a vast aspect of the federally conferred right to the particularized law of each of the states.

We submit that even in the absence of congressionally fashioned fiduciary standards, with resultant federal adoption of state trust law concepts, it is nonetheless compatible with the federal policy underlying the act to impart that measure of uniformity to Section 302(c)(5) which would necessarily be achieved by permitting the federal judiciary, consistent with a broad construction of Section 302(e), to fashion a body of federal law insuring the fulfillment of the purpose for which Section 302(c)(5) of the Act was enacted.

CONCLUSION

Based upon the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

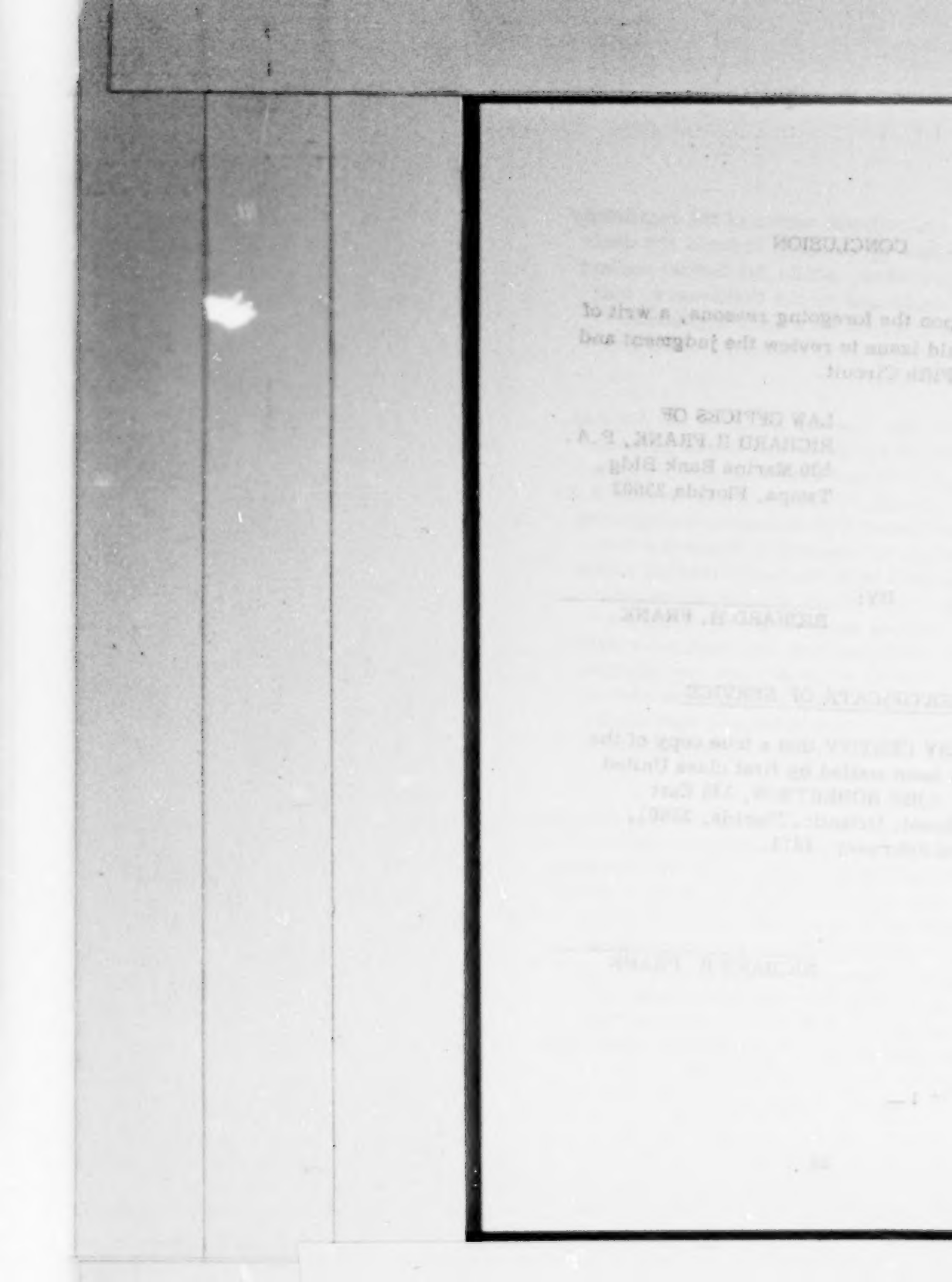
LAW OFFICES OF
RICHARD H.FRANK, P.A.
500 Marine Bank Bldg.
Tampa, Florida 33602

BY: _____
RICHARD H. FRANK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed by first class United States Mail to JOHN ROBERTSON, 538 East Washington Street, Orlando, Florida, 32801, this ___ day of February, 1974.

_____
RICHARD H. FRANK



APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FRANCIS SNIDER and GUY ASHCRAFT, individually, as representatives of a class and as Trustees of Bricklayers, Masons and Plasterers International Union, Local 15, Florida, Health & Welfare Fund,	:	
Plaintiffs	:	
-vs-	:	No. 69-237 ORL-CIVIL.
ALL STATE ADMINISTRATORS, INC., a Florida Corporation, CLAUD L. McCULLOUGH, W. S. PYNE, DON GOAD, GEORGE C. STUART, BILLIE JEAN RHAN, DAVID W. FOLEY and C. L. DICKSON,	:	
Defendants	:	

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The plaintiffs, members of the Bricklayers, Masons and Plasterers International Union Of America, Local No. 15, Florida, (Local 15), instituted this action to "conserve, recover and protect funds entrusted for the use and benefit of employees

employed by employers who are engaged in an industry affecting commerce." The Complaint seeks to invoke the jurisdiction of this Court pursuant to §302(e) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq.

The plaintiffs are trustees appointed by Local 15 to participate in the administration of the "Bricklayers, Masons and Plasterers' International Union, Local No. 15, Florida, Health and Welfare Fund" (the Fund). The Complaint alleges that the plaintiffs bring this action in their individual capacities, in their capacities as trustees of the Fund and in their capacities as representatives of the class of persons who are beneficiaries of the Fund, pursuant to Rule 23, Fed. R. Civ. P.

The Complaint alleges among other things that All State Administrators, Inc., is a Florida corporation "created for the ostensible purpose of administering the Fund"; that the corporation was "formed through the conspiratorial and unlawful efforts of the defendants George C. Stuart, Billie Jean Rhan, David W. Foley, Don Goad, C. L. Dickson, Walter S. Pyne (sic) and Claud L. McCullough, and that defendant Rhan is his step-daughter and defendant Dickson is the past president of Local 15. The Complaint further alleges:

> "The defendants Pyne and McCullough, although acting as employer representatives in the administration of the Fund, are alleged upon information and belief to be the personal agent of the other defendants for the

purpose of directing or influencing the affairs of the Fund in order to accomplish the defendants' total scheme of gaining personal benefit from the Fund.

* * * * * * * * * * * * * * * *

[e]ach of the above-named defendants has engaged in conduct wholly violative of Section 302 of the Act and has, more particularly, diverted and used entrusted funds for purposes other than those permitted by that Section of the Act.

* * * * * * * * * * * * * * * *

All State has no assets of its own and that all liabilities of All State have been unlawfully satisfied from funds belonging to the Fund and that in all other respects, All State treats and uses the assets of the Fund without regard to the statutory purpose for which they were and are being collected.

* * * * * * * * * * * * * * * *

3. The defendants Pyne, McCullough, Goad and Dickson unlawfully empowered All State freely to draw upon the assets of the Fund without the prior authority of the statutory trustees.

4. The defendants Pyne, McCullough, Goad and Dickson took no action to compel the payment by Stuart Plastering Co. of delinquent contributions to the Fund.

5. The defendants Pyne, McCullough, Goad and Dickson entered into and executed an agreement with All State without first determining whether All State was competitively less expensive than other professional administrators engaged in the business of performing ministerial tasks associated with the administration of employee fringe benefit programs.

6. The defendants Pyne, McCullough, Goad and Dickson entered into and executed an agreement with All State without first determining the precise charge which would be imposed upon the entrusted funds for services which All State would perform. A true and exact copy of such agreement, the By-Laws of the Trustees and the Minutes of the Fund's Organizational Meeting are appended hereto as Exhibits L and M."

Finally the complainants pray:

"1. That immediate injunctive relief be granted in the form of a temporary restraining order directing the defendants, their agents and each of them from distributing, spending, committing or in any way using those funds which have been collected or which may be collected pursuant to the terms of the 1969 Agreement and the Plasterers 1969 Agreement, with the exception that premium payments previously due and owing or which may become due and owing to the

Aetna Life Insurance Company, in consideration of the latter providing employee benefits, be paid.

2. That the Court, by appropriate order, nullify and abrogate the agreement between the Fund and All State upon finding that such agreement is unlawful and contrary to public policy.

3. That the Court appoint a recognized, professional administrator to conduct the ministerial affairs of the Fund pending final determination in this matter.

4. That the Court direct the defendants having possession of the books and records of All State and the Fund to place such books and records in the custody of the Clerk of Court or, alternatively, in the custody of the administrator appointed by the Court to conduct the ministerial affairs of the Fund.

5. That the Court remove the defendants and each of them from any position of trust they now occupy in connection with the affairs of the Fund.

6. That the Court order an accounting of all money due and owing the Fund from each of the defendants.

7. That the Court enter an appropriate order, as an adjunct to its plenary jurisdiction under Section 301 of the Act, requiring

the employers who are contributing to the Fund to appoint two trustees to function in the administration of the Fund.

8. That the Court find the plaintiffs' cost of this action to be properly recoverable from the defendants, including all attorney's fees incurred in connection with this proceeding.

9. That the Court grant such other and further relief as it deems proper in these circumstances."

On October 23, 1969, the day on which the complaint was filed, upon the petition of the plaintiffs, the Court (Judge Young) issued a "Temporary Restraining Order" without notice, restraining and enjoining the named defendants, for a period not to exceed 10 days from the date of the order, from, among other things, "expending, transferring, committing, pledging, or in any way utilizing any of the assets" of the Fund "with the exception that such funds may be used for * * *:

A. The payment of salaries to clerical employees who perform duties and tasks associated solely with the administration of the Fund.

B. The payment of postage.

C. The payment of computer expense.

D. The payment of premiums due and owing or which properly become due and owing to Aetna Life Insurance Company of Hartford, Connecticut."

The Court's order further directed each of the defendants to:

> "refrain from the expenditure of any funds or assets belonging to or collected on behalf of [the Fund] in payment or satisfaction of any legal expenses, including attorneys' fees, corporate or other taxes, rents of any kind, premiums which are or may become due and owing upon life insurance policies upon the lives of the defendants Foley and Stuart or any other persons (except beneficiaries), travel expenses and advertising, with the exception that any payroll taxes which are or may become due and owing the United States Government relative only to the Fund and its administration may be paid from assets of the Fund."

On October 31, 1969, the application for preliminary injunction came on for hearing before Judge Young, and in view of the evidence which had theretofore been presented to the Court, and upon the statement of counsel for defendants that the defendants did not desire to present any evidence and that they had no objection to the Court granting the preliminary injunction, the Court found that the agreement between All State Administrators, Inc., and the Bricklayers, Masons and

Plasterers International Union, Local 15, Florida, Health and Welfare Fund:

> "[l]eaves in a hazardous and uncertain state the amount of money which the defendant All State may charge and receive as a fee for services it performs in connection with the administration of the Fund. It is the judgment of the Court that such nebulous and indefinite arrangement between All State and the aforementioned Board of Trustees, as well as expenditures which have been made from the assets of the Fund, could result in irreparable harm to the corpus of the trust and the ultimate beneficiaries of the Fund."

On November 4, 1969, the Court entered a preliminary injunction enjoining the defendants from:

> "[e]xpending, transferring, committing pledging, or in any other way utilizing any of the assets of the Bricklayers, Masons and Plasterers International Union, Local 15, Florida, Health and Welfare Fund held by or in the possession of, or which during the term of this order are held by or in the possession of either the defendant All State Administrators, Inc., or any of the above named individual defendants with the exception that such funds may be used for the purposes specified below:

a) The payment of salaries to clerical employees who perform duties and tasks associated solely with the administration of the Fund.

b) The payment of postage.

c) The payment of computer expense.

d) The payment of premiums due and owing or which properly become due and owing to Aetna Life Insurance Company of Hartford, Connecticut."

The defendants were further enjoined from:

"[t]he expenditure of any funds or assets belonging to or collected on behalf of the Bricklayers, Masons and Plasterers International Union, Local 15, Florida, Health and Welfare Fund in payment or satisfaction of any legal expenses, including attorneys' fees, corporate or other taxes, rents of any kind, premiums which are or may become due and owing upon life insurance policies upon the lives of the defendants Foley and Stuart or any other persons (except beneficiaries), travel expenses and advertising, with the exception that any payroll taxes which are or may become due and owing the United States Government relative only to the Fund and its administration may be paid from assets of the Fund."

The defendants were further ordered:

> "[t]o procure a surety bond in the amount of Ten Thousand Dollars ($10,000.00) securing the trust estate against loss by reason of acts of fraud or dishonesty and such bond shall extend to each and every person who, as contemplated by 29 U.S.C. Section 308d, * * * * * *."

The defendants were also ordered to furnish to the Court and to the plaintiffs a full and complete accounting of each and every receipt and disbursement associated with the Fund on each Monday of every week beginning with November 3, 1969, for the previous week.

In addition, the order directed that counsel for the plaintiffs or their agent should have access to the books and records for auditing, inspection and copying.

The defendants filed motions to dismiss alleging that the court was without jurisdiction under §186 Title 29 U.S.C. These motions were by Judge Young overruled with the suggestion that a final determination of the question of the jurisdiction of the court should await a hearing of the testimony. Subsequent thereto the defendants answered denying all of the allegations of the complaint except the execution of certain wage and hour agreements, and they affirmatively alleged that they were authorized and did enter into a contract with All State Administrators, Inc. for the pur-

pose of administering the health and welfare fund of the Union; that all of the expenditures made by defendants were proper, necessary or incidental to the operation of the Fund; that in the alternative if the disbursements were improper, they were made in good faith and belief by the defendants; that said payments were made within the scope of their authority under said contract, and that if in truth and in fact said disbursements were improper they were made by the defendants through an honest mistake and without fraudulent motive or intent; [1] that they had taken no fee for their services rendered, and that such fee would be in excess of any expenditures that may have been mistakenly or improperly made; that the plaintiffs Francis Snider and Guy Ashcraft do not come into the cause with clean hands, and that they do not truly represent the Union but in truth and in fact are motivated by personal gain for themselved and others.

Defendant All State also filed a counter-claim against the plaintiffs alleging that the plaintiffs had "wrongfully and maliciously interfered with the contractual rights of the counter-claimant in that the counter-defendant Francis E. Snider wrote a series of letters to employers who participated in the health and welfare fund program and advised employers to cease making such payments to the counter-claimant."

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[1] At trial the defendants offered to pay back all funds which had been improperly expended, without admitting that there had been any intentional wrongdoing on their part with respect to such expenditures.

The case was transferred by Judge Young to the undersigned Judge. It came on for trial on Monday, February 8, 1971, and was terminated on February 10, 1971. At the beginning of the trial the Court advised the parties that no evidence in support of the counterclaim would be heard on the ground that the Court was without jurisdiction to hear and determine the issues that were raised therein.

At the conclusion of the trial, the case was taken under advisement and the parties were allowed time within which to file briefs. A transcript of the record of approximately 780 pages of testimony was prepared. The last brief was filed in December 1971, and at the plaintiffs' request, the case was argued on January 28, 1972.

The membership of Local 15 is comprised of craftsmen in the trades of bricklaying, masonry and plastering in the central Florida counties of Orange, Lake, Osceola and Seminole. During the latter part of September, 1968 negotiations were begun with employers in the area in an attempt to secure agreements concerning wages, hours and working conditions concerning the crafts. As a result of these negotiations two collective bargaining agreements were entered into, each to be effective from March 1, 1969 through February 28, 1973.

The first agreement which was entered into on December 1, 1968, covered union plasterers employed in the four county area. The second was entered into on December 9, 1968, and it covered union bricklayers and cement masons employed in the same four county area.

The plasterers' contract was signed by defendant Don Goad as Business Agent of Local 15 and by defendant G. C. Stuart as President of the Plasterers Association, Inc., of Orange, Osceola, Lake and Seminole Counties. The bricklayers and cement masons contract was also signed by defendant Goad as Business Agent for the Union and by Arthur Innanen as Chairman of the labor negotiating committee representing the masonry contractors in the four Florida counties.

Each of the collective bargaining agreements provided that the employers would pay certain amounts per hour worked by union employees to each of two funds, a health and welfare fund and a pension fund. The agreements further provided that payments to the health and welfare fund, authorized by §186 Title 29 U.S.C. (§302(e) of the National Labor Relations Act), were to commence on March 1, 1970. Such contributions were to be made to both funds during the life of the contracts.

This litigation concerns only the health and welfare fund which has accumulated as a result of payment by employers under the agreements, and we are not here concerned in any way with the pension fund.

During the latter part of 1968, at a time when George C. Stuart and Don Goad were engaged in contract negotiations between the employers and Local 15, Stuart and Goad, anticipating that the wage and hour negotiations then under way would result in the establishment of a trust fund, and evidently anticipating the financial advantages that might be gained from the administration of

such a fund, set up the machinery for acquiring the control and management of the Fund. And, further anticipating that other similar wage and hour agreements throughout the State of Florida would be executed, they created an organizational structure in order to provide for statewide administration of similar trust funds.

In November, 1968, before the wage and hour agreements had been signed, the defendants George C. Stuart, David W. Foley and Billie Jean Rhan, Don Goad's step-daughter who resided in Silver Spring, Maryland, filed applications with the Secretary of State of the State of Florida, seeking the incorporation of six corporations under the title of All State Administrators, Inc. of Orlando; All State Administrators, Inc. of Jacksonville; All State Administrators, Inc. of Miami; All State Administrators, Inc. of Tallahassee; All State Administrators, Inc. of Tampa, and All State Administrators, Inc.

George C. Stuart, Billie Jean Rhan and John M. Tate, filed a seventh application for the incorporation of Orange Services, Inc. George C. Stuart testified that this corporation was to serve as a holding company for the other six corporations. Each of the corporations had 20 shares of stock valued at $10.00 each. A certificate of incorporation was issued for each of the above named corporations by the Secretary of State on December 12, 1968. Each of the corporations as specified in the charter was authorized "to engage in the administration and servicing of health and welfare funds, insurance accounts and other enterprises or business acitivities."

On December 27, 1968, 38 days before the trust agreement was signed, the defendant Don Goad as Business Agent of Local 15, and defendant George C. Stuart as President of "All State Administrators, Inc. of Orlando", "jumped the gun" and signed a document which purported to employ All State Administrators, Inc. of Orlando (not a party to this action) as "the administrator of the health and welfare and pension funds of Local 15 which funds are in the process of being created at the present time." [Emphasis supplied]

This document provided that "such agreement shall be ratified and perhaps expended in more detail at a later date in an agreement between the trustees of said health and welfare and pension funds and All State Administrators, Inc. of Orlando, at a meeting of such trustees." Obviously, considering the date of this agreement, it was a complete nullity. No authority had been given Goad by the members of Local 15 for the execution of such a contract. The contract itself refers to a trust fund that had not yet been created, and it purports to bind trustees who had not yet been selected. We cite this agreement only for such weight as it may have as an indication of the state of mind of the defendants in their attempt to gain control of the trust fund.

Following the execution of the wage and hour agreement, Local 15 selected two of its members, defendants Don Goad, Business Agent of the Union, and defendant C. L. Dickson, a member of the Union, as trustees. Claud L. McCullough and Walter S. Pynes were selected as trustees to represent the employers in the establishment of the

trust fund under the provisions of the wage and hour agreement. Pursuant to the authority conferred upon them as trustees, they did, on February 3, 1969, execute an "Agreement and Declaration of Trust"[2] in conformity with the provisions of Section 302(e) of the National Labor Relations Act, §186 Title 29 U.S.C.[3]

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[2] The Trust Agreement is attached hereto as Appendix A.

[3] Section 186(c)(5)(B) provides:
(B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; * * * * * * *."

The Trust Agreement, among other things, provides in Article V Section 1:

> "The Trustees shall appoint an Administrator who may be one of the Trustees or may be an individual or a corporation, and may delegate any of their administrative or ministerial powers or duties hereunder to him or it, or to any of their agents or employees; provided, however, that the Administrator and any such agent or employee authorized to have access to money or things of value belonging to the Fund, shall be bonded in such amount and secured by such surety company as required by law, and as the Trustees, shall determine."

Article X provides that:

> (1) All reasonable and necessary expenses of collecting the Employer contributions and administering the affairs of this Trust, including but without limitation, the employment of such administrative, legal, expert and clerical assistance, the purchase of or leasing of such premises and the purchase of or lease of such materials, supplies and equitment as the Trustees, in their discretion find necessary or appropriate in the performance of their duties."

Shortly after the execution of the Trust Agreement, in order to establish and guarantee the economic soundness of the trust fund, the trustees

The Trust Agreement, among other things, provides in Article V Section 1:

"The Trustees shall appoint an Administrator who may be one of the Trustees or may be an individual or a corporation, and may delegate any of their administrative or ministerial powers or duties hereunder to him or it, or to any of their agents or employees; provided, however, that the Administrator and any such agent or employee authorized to have access to money or things of value belonging to the Fund, shall be bonded in such amount and secured by such surety company as required by law, and as the Trustees, shall [illegible]."

Article V provides that:

(1) All reasonable and necessary expenses of collecting the Employer contributions and administering the affairs of this Trust, including but without limitation, the employment of such administrative, legal, expert and clerical assistance, the purchase of necessary [illegible] of such premises and the purchase or lease of such materials, supplies and equipment as the Trustees, in their discretion, find necessary or appropriate in the performance of their duties."

Article VI provides the procedure for the Trust Agreement to be established and [illegible] the Trust Fund, the trustees

signed an application for insurance with the Aetna Life & Casualty Company, and a policy of insurance was issued pursuant to that application to underwrite the health and welfare Fund. John M. Tate, an agent of Aetna and a close friend of the defendant David W. Foley also an Aetna agent, represented the insurance company in securing the insurance. At the trial Tate testified that he rebates 70% of the commission he receives for the writing of such contract to defendant Foley.

Following the execution of the Trust Agreement, the trustees assumed supervision and management of the newly created trust, and according to the testimony of the trustees they entered into a written agreement with All State Administrators, Inc. of Orlando, as administrator of the Fund. The Contract, a copy of which was received in evidence as Exhibit 21 provides in part:

> "Trustees empower the Second Party with any and all necessary ministerial powers and duties incident to the operation of said fund, including the collecting and the processing of payments to be made by Employers into said fund and the processing of all claims for benefits under the welfare plan adopted by First Party, and any and all other disbursements of funds necessary or incidental to the operation of the above and aforementioned fund, acting as Agent for the Trustees." [4] (Emphasis supplied)

[4] Exhibit 21, in its entirety, is made a part hereof as Appendix B.

The trustees further agreed to pay All State Administrators, Inc. of Orlando the actual cost of administering the plan plus a reasonable fee for services rendered. A copy of the alleged agreement received in evidence was undated, and the first paragraph thereof recited that it was "made and entered into this ___ day of _____ 1969," and that it was "for a period commencing _____ and ending March 1, 1973." It was purported to have been signed by Don Goad, C. L. Dickson, Walter S. Pynes and Claud L. McCullough.

The plaintiffs objected to the receipt of this purported contract in evidence, and strongly insisted that this alleged contract was not in fact entered into as testified by the witnesses. The plaintiffs contend that its execution was an after-thought on the part of the trustees and All State, and that in fact it was executed in the Summer of 1969, long after All State had taken over the administration of the Fund, and after dissatisfaction had arisen concerning the management of the trust.

Plaintiffs further urge with respect to the alleged agreement that All State Administrators, Inc. of Orlando has and is administering the Fund without legal authority.

The testimony as to the circumstances and the time when the alleged contract was entered into is at best unclear but the positive and direct testimony offered by the defendants must be given greater weight than the mere conjecture offered by the plaintiffs. There exists no convincing evidence to establish that the contract was executed other than as testified to by the defendants.

Certainly the alleged contract fails to show that it was the work-produce of a lawyer or even that of a skilled business man who was mindful of the obligations of trustees which are to be assumed in the management of such a fund. By their own admissions none of the incorporators of the All State corporations or the trustees signing the Trust Agreement had any prior experience in the handling of trusts involving health and welfare funds, and they had no idea as to the cost of administering such a fund. They therefore wrote into the agreement that the trustees would pay to the administrator the actual cost of administering the plan plus a reasonable fee for services rendered.

After All State Administrators, Inc. of Orlando, took over administration of the Fund, all the monies that were collected were deposited in the name of the administrator and paid out by it as it saw fit. It immediately paid out of trust funds, all of the costs and fees incident to the incorporation of the six All State corporations and of Orange Services, Inc. which included attorney fees. It also paid the insurance premiums on policies of insurance on the lives of defendants Stuart and Foley, as well as traveling and other expenses which apparently were in no wise connected with the administration of the Fund. Trust monies were used for entertaining expenses unconnected with the purposes of the Fund. Trust funds were also used to pay entertainment expenses incident to the Local 15 election in which Goad was defeated as Business Agent.

The defendants seem to justify these expenditures on the theory they had a right to use the funds, and even if they did not have such right, All State would receive fees for its services as administrator, out of which could be returned the improperly diverted funds of the Trust. Quite naturally this brought about dissension and discontent among some members of the Union including the plaintiffs.

The result of this dissension was that on June 21, 1969, at an election held by the Union, plaintiff Francis Snider was elected as Business Agent of Local 16 defeating defendant Don Goad. On August 5, 1969, following the June 21 election, Snider and plaintiff Guy Ashcraft were elected as trustees of the health and welfare fund replacing Goad and Dickson. From the time Snider and Ashcraft became trustees representing the Union they engaged in a concerted action to remove All State as administrator of the Fund.

On September 3, 1969, the new Union trustees and McCullough and Pynes on behalf of the employers, agreed to an audit of the Fund. The audit was conducted by Griffith and Johnson, certified public accountants. The report of the auditors revealed facts concerning the improper use of trust funds for the personal benefit of All State.

In the applications for the charters of the seven corporations which we have heretofore named, the address of each corporation was given as No. 1 Drennen Drive, Orlando, Florida, which was the building occupied by the Stuart Plastering Company of which George C. Stuart was President.

On March 1, 1969, the effective date of the operation of the Trust Fund, George C. Stuart, as lessor, entered into a lease with All State Administrators, Inc. of Orlando, under the terms of which Stuart agreed to provide a part of the building occupied by the Stuart Plastering Company at No.1 Drennen Drive, for the sum of $200.00 per month for the first six months beginning March 1, 1969 and $300.00 per month thereafter for the duration of the four year lease, and was to terminate at the expiration of the "Trust Agreement between All State Administrators, Inc. of Orlando" and Local 15, with the option to renew for a period of five years. Stuart signed the document as lessor and David W. Foley as secretary-treasurer of All State Administrators, Inc. of Orlando. At that time Stuart was President of All State Administrators, Inc. of Orlando.

The Trust Agreement executed by the trustees on February 3, 1969, substantially meets the legal requirements of the statute, with one important exception. Section III of the Agreement which fixed the number of trustees to be chosen by each side as two, complies with the requirements of Section 186 (c) (5) (B) Title 29 U.S.C., but omits the language:

> "* * * together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break

> such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office * * * * *."

The statute provides that the trustees who are to administer the fund must be selected by the contracting parties. The selection of the neutral parties referred to therein is to be by the representatives of the employers and employees. In the event of a deadlock and there are no neutral persons to break such deadlock, then the agreement should have provided for these two groups to agree on an impartial umpire to decide such dispute, or if they could not agree, then such impartial umpire as the District Court might appoint upon the petition of either group.

In view of the clear provisions of the statute with respect to the selection of those groups, we believe that although the agreement itself does not contain the exact requirements of the statute, that such requirements by inference must become a part of every contract for the administration of such funds. We will discuss later the effect of this provision of the statute upon the controversy now before us.

The plaintiffs have not attacked the validity of the Trust Agreement although they do attack the manner in which the trustees were selected and they contend that the trustees were without authority to enter into the contract with All State Administrators, Inc. of Orlando. We find some difficulty in reconciling plaintiffs' position in this respect. If the trustees had authority to execute the Trust Agreement, they had authority to execute the contract with the administrator.

The plaintiffs charge that the employers' trustees were handpicked by Stuart. The correctness of this contention may be accepted, but by way of explanation, defendants say that they experienced difficulty in finding persons willing to serve as trustees because it was a completely thankless job. Naturally trustees representing the employers would not have as keen a personal interest in the administration of the Trust as would the trustees of the recipients of the benefits of the Fund.

Since the identity of the employers does not appear from the record, except the Plasterers Association which is a corporate entity of which Stuart is President, we must assume that all the employers are composed of contractors who employ Union labor in the area covered by the wage and hour agreement. The makeup of the employer group at least insofar as selection of trustees is concerned might well be expected to change from time to time as the employers completed projects requiring Union labor in the four county area.

It is true that Stuart did select those who were closely associated with him. Pynes at the time was working for a contractor who occupied premises at 1 Drennen Drive, the location of the Stuart Plastering business, and McCullough was an employee of the Stuart Plastering Co. Before Pynes was asked to serve as a trustee Stuart obtained approval from Pynes' employer concerning the appointment.

Even if all formalities had not been complied with, the acts of the employers' representatives were ratified by the employers, who were the only ones responsible for their selection. Such ratification of the selection occurred by the continuing contributions of the employers to the Trust Fund.

We do not believe that the Union has any standing to object to or criticize the manner in which the representatives of the employers were chosen. The employers had the sole responsibility for the selection of their own representatives and the manner of the trustees' selection and who they were was of no concern to the employees.

The employees were, of course, quite naturally vitally concerned with the conduct of the employer-trustees in the management of the Fund. It is our conclusion that there was nothing violative of the Trust Agreement in the selection of the employer-trustees.

Considering all the testimony and the facts which we have detailed, a considerable amount of feeling is apparent between the parties. In addition, personal interest and self-dealing is apparent

by some of those in the control of the funds which should never be present in the administration of trust estates.

We believe we have fairly reviewed the material facts in chronological order, and that those facts justify our conclusion in the disposition of the case so far as this court's jurisdiction will permit. We shall consider the issues and demands of the plaintiffs in the order in which they appear in the prayer of their Complaint.

The first paragraph of the prayer seeks injunctive relief. That has been granted and apparently has served its purpose well, and upon entry of judgment in accordance with our final conclusions, such injunction should be dissolved.

The second paragraph asks the court to nullify and abrogate the agreement between the Trustees and All State Administrators, Inc. of Orlando, upon a finding that it is unlawful and contrary to public policy.

We have therefore detailed the manner in which the contract with All State came into existence.

It is our conclusion that this court is without jurisdiction to nullify any contract entered into by the trustees. Employing Plasterers' Ass'n v. Journeymen Plasterers', 279 F.2d 92 (7th Cir.1960); Moyer v. Kirkpatrick, 265 F.Supp 348 (E.D.Penn, 1967), affirmed 387 F.2d 955 (3rd Cir. 1968). Even if this court was vested with such authority under §186, we could not nullify the contract in this proceeding because it was entered into between the trustees and All State Administrators, Inc. of Orlando, which has not been made a party to this action. The defendant here is All State Administrators, Inc.

It will be recalled that each of the six corporations was a separate and distinct entity, and we have no jurisdiction in this proceeding over the administrator, All State Administrators, Inc. of Orlando, in its corporate capacity. If we assume that this court did have the authority to nullify the contract, we can find no basis in fact or in law for doing so. It was neither unlawful nor against public policy. Its vice lay in the misuse of Trust funds, not in the provisions of the contract.

The third prayer asks the Court to appoint a qualified professional administrator to conduct the affairs of the Fund pending a final determination of the case. Again we find no authority in the law for such action by this court. Kroger Co. v. Blassie, 225 F.Supp. 300 (E.D.Mo. 1969). Such an appointment would be in the nature of a receiver. If that is justified, which we do not believe it is for another court to determine. Bowers v. Ulpiano Casal, Inc., 393 F.2d 421 (1st Cir. 1968). A fair consideration of all the evidence convinces the court that there was no sincere attempt made on the part of the employee-trustees Snider and Ashcraft to cooperate with the employers-trustees in correcting whatever wrongs have been committed or to administer the affairs of the trust.

The Union apparently very appropriately selected new trustees to represent it in connection with the Fund, and almost immediately they sought to nullify the contract. They realized that there had been a misappropriation of the funds by the administrator and with the consent of the employer-trustees they demanded and obtained an agreement

for an audit. But, without further effort to work out any solution of the problem, they instituted this suit, which, of course, made it impossible or at least difficult for the trustees to cooperate in performing their duties under the law and under the Trust Agreement. In other words, the line of communication between the parties broke down.

Paragraph four of the prayer seeks to have all the books and records of All State Administrators, Inc. and of the Fund placed in the custody of the court or in the custody of an administrator appointed by the court to conduct the affairs of the Fund. The plain asnwer to that is that the books and records have been available to the plaintiffs since the start of this litigation and unquestionably will remain so. The Statute provides a severe penalty for failure of an administrator to make the books and records available to those entitled to see them. 29 U.S.C. §301 et seq.

Paragraph five asks the court "to remove the defendants and each of them from any position of trust they now occupy in connection with the affairs of the Fund." The answer to this prayer insofar as the administrator is concerned, will be found in the disposition of prayers one and two above.

Article VII of the Agreement and Declaration of Trust provides the method of removal and replacement of a trustee. The contributing employers and the Union have the right from time to time to remove and replace any trustees designated by

them with or without cause by giving written notice to the remaining trustees. The only power vested in the court to appoint a trustee under the terms of the contract is in the event of a vacancy or vacancies which are not filled within 30 days. In such event the remaining trustees may petition the United States District Court to appoint a trustee to fill the vacancy.

Section 8 of the Article further provides: "Any Employer, or the Union may initiate charges for malfeasance or non-feasance against a Trustee by filing such charges with the Administrator." This section also provides:

> "Such charges shall be referred by the Administrator to the Trustee who shall arrange the appointment of a Board of Inquiry which shall consist of an equal number of members so appointed by the Employers and the Union. The members so appointed shall attempt to agree upon an additional member to act as impartial chairman and if within five (5) days an impartial chairman is not agreed upon, the Trustees shall apply to a Judge of the United States District Court for appointment of an impartial chairman."

Article VIII gives aid to the trustees in meeting this situation. None of the requirements either of the Trust Agreement or of the Statute were complied with. Again the court is faced with the lack

of authority to remove the trustees or to say to either the employers or the Union that they should select new trustees.

In arriving at this conclusion based upon all the evidence and in light of the apparent feeling that has been generated in this case, we hope we may be pardoned if we seem so bold as to make a suggestion outside of our jurisdiction. It is apparent that the present trustees likely will not reconcile their differences concerning the method and manner of administering this trust fund.

The Fund's administration is vital to the employees of the labor organization. It is of little concern to the employers. The employers are simply contributors to the Fund without realizing any benefits or consideration therefor. But whoever the trustees may be they still owe a high sense of duty and fidelity in the administration of a trust fund, and when they assume the responsibility, they ought to conscientiously carry it out. We are not saying that they have not done so since the issuance of the temporary restraining order.

The Union changed its trustees who now seem to be, so far as we can determine, satisfactory to them. If the employers would voluntarily do the same thing, and the four trustrees would select "neutral persons" or an "umpire" to settle disputes which may arise, as provided in the Statute, it seems to us that the administration of this Fund, even through the present administrator would not

be difficult for the remainder of the life of this contract which expires March 1, 1973. This is simply a gratuitous suggestion which we have no authority to enforce. If any employer or the Union desires to prefer charges against a trustee, the procedure for so doing is set forth in the Trust Agreement.

The answer to prayer six for an accounting we feel is not now important in that there has been an accounting of all funds taken in and paid out since this suit was filed.

The answer to prayer seven may be found in our answer to number five. We have no authority to remove or appoint trustees or to require any party to remove or appoint new trustees

The next and last prayer asks that the costs be taxed against the defendants, including attorney fees. The two employee-trustees saw fit to employ counsel in this case and to institute this litigation. We have no authority in the law for allowing attorney's fees to be taxed against the Fund or to be taxed against any of the defendants in this case. The final solution of the difficulty between the parties is not an easy one, but the way is clear to bring about the proper administration of the Fund, if the parties show a spirit of cooperation in doing so.

Under the terms of the contract between the trustees and All State, the administrator is specifically made the agent of the trustees and they are

responsible for the actions of the administrator. The funds of the Trust do not become the funds of its administrator although it is authorized to administer them, to collect money and pay it out, but this must be done under the direction of the trustees. How the Fund is administered is the ultimate responsibility of the trustees, and under the law they become liable for any misconduct on the part of the administrator, who, pursuant to the contract, is their agent.

The contract for administration provides for the allowance of a reasonable fee for the services of the administrator. The question is not before this court and should be resolved by the trustees and the administrator. If it cannot, again we say that the remedy lies in another court and not here. Reasonable mean out sincerely to attempt to come to reasonable conclusions, and if they cannot, then they will have to resort to such tribunals as are vested with the authority to determine and enforce the rights and obligations arising out of the contract and the Trust Agreement.

We reserve the final order in this case for a period of thirty (30) days from the date of the entry of this Opinion and continue the preliminary injunction during that period. If the parties are not able by that time to agree upon a plan for the continuation of the administration of the Fund, for the remainder of the life of the Agreement, the injunction will be dissolved and the cause dismissed for lack of jurisdiction.

DONE and ORDERED in chambers in Kansas City, Missouri, this 10th day of July, 1972.

/s/ Richard M. Duncan
RICHARD M. DUNCAN
UNITED STATES SR. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 69-237-ORL-CIV

FRANCIS SNIDER, et al,

Plaintiffs,

vs.

ALL STATE ADMINISTRATORS, INC., et al,

Defendants.
_____/

FINAL ORDER

THIS CAUSE came on to be heard upon the Motion of the Defendants in this cause for a Final Order of Dismissal, and an Order of Dissolution of the Injunction heretofore entered in this cause, and the Court being fully advised in the premises, it is thereupon

ORDERED and ADJUDGED as follows:

1. That the Temporary Restraining Order entered by the Honorable George C. Young, Judge of the United States District Court, in and for the Middle District of Florida, Orlando Division, and

the Preliminary Injunction entered by the said Honorable George C. Young on the 4th day of November, 1969, be and the same are hereby dissolved.

2. That the surety, American Fire and Casualty Company, Orlando, Florida, is hereby relieved of it's obligation under the bond undertaking filed in this cause by it.

3. That this cause be and same is hereby dismissed for lack of jurisdiction in this cause and the Plaintiffs shall go hence without day.

DONE AND ORDERED this 15th day of September, 1972, in Chambers in Kansas City, Missouri.

/s/ Richard M. Duncan
RICHARD M. DUNCAN
United States Senior District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Order has been furnished by mail to JOHN M. ROBERTSON, ESQUIRE, 538 East Washington Street, Orlando, Florida 32801, Attorney for Defendants, and to RICHARD H.FRANK, ESQUIRE, 918 Marine Bank Building, Tampa, Florida, Attorney for Plaintiffs, this ____ day of September, 1972.

Wesley R. Thies, Clerk
United States District Court

By: _____
Deputy Clerk

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which

shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101–115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, Pub.L. 86–257, Title V, § 505, 73 Stat. 537.

Historical Note

References in Text. Part II of the Interstate Commerce Act, referred to in subsec. (b) (2), is classified to chapter 8 of Title 49, Transportation.

Section 381 of Title 28, referred to in subsec. (e) was omitted from the revision of Title 28 by Act June 25, 1948, c. 646, 62 Stat. 869, as covered by Rule 65 of the Federal Rules of Civil Procedure.

"Sections 101–115 of this title," referred to in the text, is a reference to Act Mar. 23, 1932, c. 90, 47 Stat. 70, popularly known as the Norris-LaGuardia Act.

Section 11 of that Act, formerly classified to section 111 of this title, was repealed and reenacted as section 3692 of Title 18, Crimes and Criminal Procedure, by Act June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948.

Section 12 of that Act, formerly classified to section 112 of this title, was also repealed by Act June 25, 1948, and is now covered by Rule 42(b), Title 18,

Table 4 -- Distribution of 178,670 Welfare and Pension Benefit Plans, by Type of Plan, and by Type of Administrator 1/

Type of Administrator	Number of Plans				Percent Distribution			
	Total all Plans	Welfare Plan	Pension Plan	Combination Plan	Total all Plans	Welfare Plan	Pension Plan	Combination Plan
TOTAL -- ALL PLANS	178,670	133,897	43,626	1,147	100.0	100.0	100.0	100.0
Employer or Employer Association	161,526	123,422	37,256	848	90.4	92.2	85.4	73.9
Joint Employer-Employee Board of Trustees	8,872	4,802	3,913	157	5.0	3.6	9.0	13.7
Employee Organization	2,804	2,430	340	34	1.5	1.8	.8	3.0
Other and Unclassified	5,468	3,243	2,117	108	3.1	2.4	4.8	9.4

1/ The Act defines the administrator of the plan as follows: "(1) the person or persons designated by the terms of the plan or the collective bargaining agreement with responsibility for the ultimate control, disposition, or management of the money received or contributed; or (2) in or contributed, irrespective of whether such control, disposition, or management is exercised directly or through an agent or trustee designated the absence of such designation, the person or persons actually responsible for the control, disposition, or management of the money received by such person or persons". Under the Act, the term "person" means "an individual, partnership, corporation, mutual company, joint-stock or employee organization."

Table 9 - Percent of Employee Welfare and Pension Benefit Plans Providing Specified Benefits, Selected Dates 1959-1973

Type of Benefit	Percent of Plans Providing Specified Benefit as of -						
	August 31, 1959	July 1, 1961	July 1, 1963	July 1, 1965	April 1, 1968	January 1, 1971	January 1, 1973
Number of Plans - Total	127,657	144,700	161,750	163,500	157,700	174,560	178,670
Welfare Type Benefits							
Hospital	51.8	51.9	51.1	50.9	50.6	46.5	46.1
Surgical	50.5	50.4	49.8	49.6	49.3	45.4	45.0
Life Insurance or Death Benefit	47.2	47.7	47.3	47.0	46.9	44.5	45.1
Medical	39.6	40.6	41.1	41.6	41.5	39.9	40.4
Accidental Death and Dismemberment	31.7	32.5	33.3	33.7	33.8	33.2	34.4
Accident and Sickness	25.7	25.3	24.4	24.2	24.5	25.2	26.3
Paid Sick Leave	2.8	2.6	2.4	2.3	2.3	2.2	2.8
Unemployment	.7	.7	.7	.7	.7	.6	.8
Dental	.1	.2	.2	.2	.2	.5	1.1
Pension Type Benefits							
Retirement for Age or Service	19.5	19.6	20.2	20.9	21.1	24.1	25.1
Retirement for Disability	13.7	13.9	14.4	15.1	15.2	17.9	17.8

Table 2 - Distribution of 178,670 Welfare and Pension Benefit Plans, by Type of Plan, and by State Location of Principal Office

State	Number of Plans				Percent Distribution						
					By State			By Type of Plan			
	Total all Plans	Welfare Plan	Pension Plan	Combination Plan	Welfare Plan	Pension Plan	Combination Plan	Total all Plans	Welfare Plan	Pension Plan	Combination Plan
TOTAL -- ALL STATES	178,670	133,897	43,626	1,147	100.0	100.0	100.0	100.0	75.0	24.4	.6
Alabama	1,887	1,509	365	13	1.1	.8	1.1	100.0	80.0	19.3	.7
Alaska	88	69	19	0	.1	1/	0	100.0	78.4	21.6	0
Arizona	973	782	188	3	.6	.4	.3	100.0	80.4	19.3	.3
Arkansas	920	744	173	3	.6	.4	.3	100.0	80.9	18.8	.3
California	14,320	11,274	2,972	74	8.5	6.8	6.4	100.0	78.7	20.7	.6
Colorado	1,644	1,278	352	14	.9	.8	1.2	100.0	77.7	21.4	.9
Connecticut	4,223	3,062	1,140	21	2.3	2.6	1.8	100.0	72.5	27.0	.5
Delaware	509	362	146	1	.3	.3	.1	100.0	71.1	28.7	.2
District of Columbia	1,475	1,084	373	18	.8	.9	1.6	100.0	73.5	25.3	1.2
Florida	4,550	3,691	833	26	2.8	1.9	2.3	100.0	81.1	18.3	.6

See footnote at end of table

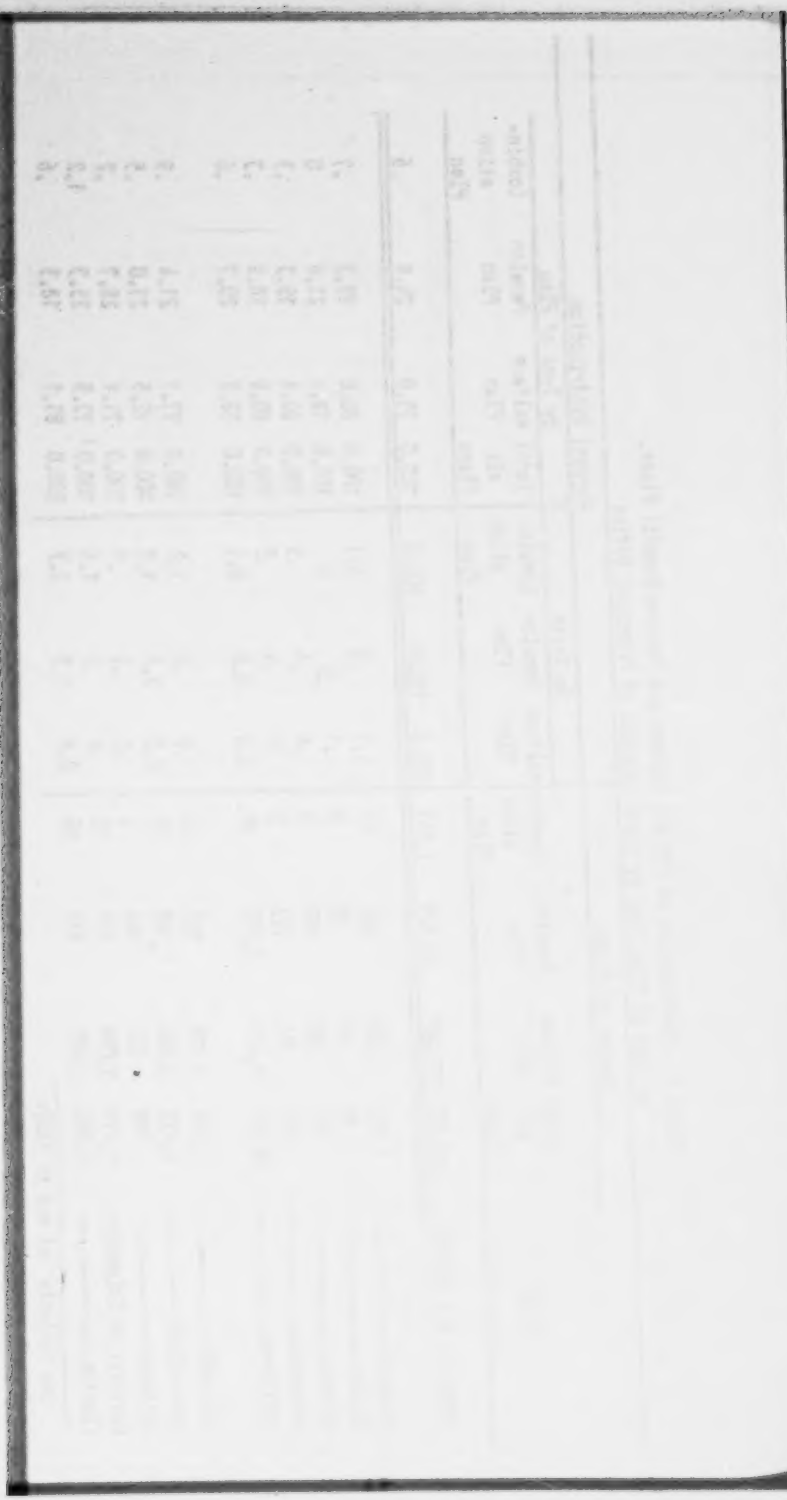


Table 2 - continued

State	Number of Plans				Percent Distribution						
					By State			By Type of Plan			
	Total all Plans	Welfare Plan	Pension Plan	Combination Plan	Welfare Plan	Pension Plan	Combination Plan	Total all Plans	Welfare Plan	Pension Plan	Combination Plan
TOTAL -- ALL STATES	178,670	133,897	43,626	1,147	100.0	100.0	100.0	100.0	75.0	24.4	.6
Georgia	3,483	2,799	665	19	2.1	1.5	1.6	100.0	80.4	19.1	.5
Hawaii	1,171	846	318	7	.6	.7	.6	100.0	72.2	27.2	.6
Idaho	380	295	81	4	.2	.2	.3	100.0	77.6	21.3	1.1
Illinois	12,693	9,226	3,394	73	6.9	7.8	6.4	100.0	72.7	26.7	.6
Indiana	4,334	3,085	1,224	25	2.3	2.8	2.2	100.0	71.2	28.2	.6
Iowa	2,019	1,563	445	11	1.2	1.0	1.0	100.0	77.4	22.0	.6
Kansas	1,479	1,165	307	7	.9	.7	.6	100.0	78.8	20.8	.4
Kentucky	1,874	1,446	414	14	1.1	.9	1.2	100.0	77.2	22.1	.7
Louisiana	2,003	1,623	371	9	1.2	.9	.8	100.0	81.0	18.5	.5
Maine	847	681	164	2	.5	.4	.2	100.0	80.4	19.4	.2
Maryland	2,710	1,984	707	19	1.5	1.6	1.6	100.0	73.2	26.1	.7
Massachusetts	7,088	5,296	1,754	38	3.9	4.0	3.3	100.0	74.7	24.7	.6
Michigan	7,589	5,314	2,218	57	3.9	5.1	5.0	100.0	70.0	29.2	.8
Minnesota	3,445	2,613	816	16	1.9	1.9	1.4	100.0	75.8	23.7	.5
Mississippi	1,063	854	205	4	.6	.5	.3	100.0	80.3	19.3	.4

Table 2 - continued

State	Number of Plans				Percent Distribution						
					By State			By Type of Plan			
	Total all Plans	Welfare Plan	Pension Plan	Combination Plan	Welfare Plan	Pension Plan	Combination Plan	Total all Plans	Welfare Plan	Pension Plan	Combination Plan
Missouri	4,397	3,334	1,032	31	2.5	2.4	2.7	100.0	75.8	23.5	.7
Montana	292	247	44	1	.2	.1	.1	100.0	84.6	15.1	.3
Nebraska	1,059	842	202	15	.6	.5	1.3	100.0	79.5	19.1	1.4
Nevada	244	194	46	4	.1	.1	.3	100.0	79.5	18.9	1.6
New Hampshire	797	611	183	3	.4	.4	.3	100.0	76.7	22.9	.4
New Jersey	6,669	4,827	1,789	53	3.6	4.1	4.6	100.0	72.4	26.8	.8
New Mexico	461	365	95	1	.3	.2	.1	100.0	79.2	20.6	.2
New York	20,626	15,155	5,323	148	11.4	12.2	12.9	100.0	73.5	25.8	.7
North Carolina	4,529	3,606	902	21	2.7	2.1	1.8	100.0	79.6	19.9	.5
North Dakota	247	189	55	3	.1	.1	.3	100.0	76.5	22.3	1.2
Ohio	11,738	8,383	3,282	73	6.3	7.5	6.4	100.0	71.4	28.0	.6
Oklahoma	1,627	1,247	362	18	.9	.8	1.6	100.0	76.6	22.2	1.2
Oregon	1,590	1,263	310	17	.9	.7	1.5	100.0	79.4	19.5	1.1
Pennsylvania	12,972	9,314	3,562	96	7.0	8.3	8.4	100.0	71.8	27.5	.7
Rhode Island	1,598	1,229	361	8	.9	.8	.2	100.0	76.9	22.6	.5

Table 2 - continued

State	Number of Plans				Percent Distribution							
					By State			By Type of Plan				
	Total all Plans	Welfare Plan	Pension Plan	Combination Plan	Welfare Plan	Pension Plan	Combination Plan	Total all Plans	Welfare Plan	Pension Plan	Combination Plan
South Carolina	1,551	1,288	257	6	1.0	.6	.5	100.0	83.0	16.6	.4
South Dakota	256	209	45	2	.2	.1	.2	100.0	81.6	17.6	.8
Tennessee	2,986	2,379	589	18	1.8	1.4	1.6	100.0	79.7	19.7	.6
Texas	9,000	6,699	2,237	64	5.0	5.1	5.6	100.0	74.4	24.9	.7
Utah	717	563	145	9	.4	.3	.8	100.0	78.5	20.2	1.3
Vermont	390	301	81	8	.2	.2	.7	100.0	77.2	20.8	2.0
Virginia	3,147	2,431	699	17	1.8	1.6	1.5	100.0	77.2	22.2	.6
Washington	1,952	1,520	420	12	1.1	1.0	1.0	100.0	77.9	21.5	.6
West Virginia	1,148	893	249	6	.7	.6	.5	100.0	77.8	21.7	.5
Wisconsin	4,851	3,280	1,543	28	2.4	3.5	2.4	100.0	67.6	31.8	.6
Wyoming	117	94	23	0	.1	.1	0	100.0	80.3	19.7	0
All Other Locations	942	789	146	7	.6	.3	.6	100.0	83.8	15.5	.7

1/ Less than 1/10 of one percent.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3326

FRANCIS SNIDER, ET AL.,
Plaintiffs-Appellants,

versus

ALL STATE ADMINISTRATORS, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(July 3, 1973)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: The appellants, members of the Bricklayers, Masons and Plasterers International Union of America, Local No. 15, Florida, initiated this action to "conserve, recover, and protect funds" entrusted to a health and welfare fund established under a collective bargaining agreement with certain contractor-employers. The district court en-

joined further expenditure of trust funds except for specified purposes. However, the court denied all further relief for lack of jurisdiction. This appeal timely followed. We affirm.

I. THE FACTS

While contract negotiations were under way between Local 15 and a number of bricklaying, masonry, and plastering contractors in the central Florida area, defendants George C. Stuart, president of the plaster contractors association, Don Goad, business manager of Local 15, and David W. Foley, a licensed insurance broker, organized several corporations for the purpose of administering union health and welfare trust funds.[1] The district court found that these corporations were organized in anticipation that negotiations then under way would result in the establishment of trust funds for which the defendants Goad and Stuart, through their respective positions with the union and employers, could control the selection of an administrator.

As a result of the negotiations, Local 15 and the employers' associations entered into two collective bar-

[1]The six corporations organized by the defendants were: All State Administrators, Inc., All State Administrators, Inc. of Orlando, All State Administrators, Inc. of Jacksonville, All State Administrators, Inc. of Miami, All State Administrators, Inc. of Tallahassee, and All State Administrators, Inc. of Tampa. The beneficial ownership of the stock in each of the "All State" corporations was divided among defendants, Stuart, Foley, and Billie Jean Rhan, Don Goad's stepdaughter. A seventh corporation, Orange Services, Inc., was organized with the plan that it would eventually serve as a holding company for the other six. The stock of Orange Services, Inc. was held by Stuart, Rhan, and John M. Tate, another insurance broker.

gaining agreements, one covering plasterers and the other bricklayers and cement masons, which provided that the employers would pay certain amounts per hour worked by union employees into a health and welfare fund to be established in accordance with Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. Sec. 186.[2]

Prior to the effective date of the collective bargaining agreement, Local 15 elected Goad, and another union member, defendant C.L. Dickson, as the two trustees to represent the union. Stuart, apparently without the concurrence of other employers, selected defendants C.L. McCullough and W.S. Pyne, both former employees of Stuart's plastering company, as trustee nominees of the employers. Pursuant to the authority conferred upon them under the trust agreement, the four trustees selected All State Administrators, Inc. of Orlando as the administrator of the trust fund.

After All State of Orlando took over administration of the Fund, all monies contributed by employers were deposited in the name of the Administrator and expenses of both the Trust and the Administrator were paid out of the common fund. Among other expenditures, the Administrator paid out of trust funds the costs and fees, including attorneys' fees incident to the incorporation of itself, of the remaining five All

[2]Both collective bargaining agreements were signed by defendant Don Goad as Business Agent of Local 15. The plasterers' contract was signed on behalf of the employers by defendant George C. Stuart as President of the Plasterers Association, Inc., Orange, Osceola, Lake, and Seminole Counties.

State corporations and of Orange Services, Inc. The Administrator also used trust funds to pay premiums on life insurance for its officers, Stuart and Foley, as well as travel and entertainment expenses unconnected with the purposes of the Trust. Trust funds were likewise used to pay entertainment expenses incident to Goad's unsuccessful campaign for reelection as Business Manager of Local 15. In addition to these expenditures, which the district court characterized as an improper diversion of trust funds, All State of Orlando executed a lease with its president, George C. Stuart, for office space in the building occupied by the Stuart plastering company and paid the rent under this lease out of the trust fund.

Simultaneous with the selection of All State of Orlando as the Administrator of the Trust, the trustees signed an agreement with Aetna Life & Casualty Company to underwrite the health and welfare fund. This policy was placed through Aetna Agent John M. Tate, a stockholder in Orange Services, Inc. Tate agreed to rebate 70% of his commission from Aetna to defendant Foley, stockholder, secretary, and a moving party in the organization of the All State corporate family.

As a result of Union members' discontent with the management of their trust fund, Goad and Dickson were removed as union trustees and replaced by Francis Snider and Guy Ashcraft. Following an audit of the trust fund, Snider and Ashcraft initiated this action on behalf of themselves and other members of Local 15. The complaint prayed for immediate injunctive relief against the improper disbursement of trust funds.

Additionally, the plaintiffs sought (a) to nullify the administration agreement between the trust fund and All State of Orlando, (b) to have the court appoint a disinterested professional administrator during the pendence of the litigation, (c) to require complete disclosure of the books and records of All State of Orlando and the fund, (d) to have the court remove the defendants from any position of trust which they occupy in connection with the fund, (e) to require the employers' association to appoint two new trustees, and (f) to order an accounting of all money due and owing to the fund from each defendant.

The district court enjoined further improper disbursements,[3] but with the exception of ordering disclosure of records, refused additional relief on the ground that federal labor statutes did not provide jurisdiction to grant the remedies sought. The order of dismissal *recommended* that, if the parties were unable to resolve their differences by compromise, they should seek relief in State courts.

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[3]The preliminary injunction entered November 4, 1969 forbade the expenditure of trust assets for any purpose other than the payment of salaries of clerical employees who perform duties associated solely with the administration of the Fund, postage, computer expense, and premiums for health insurance for Union members due to Aetna Life Insurance Company. Specifically, the defendants were enjoined from expending trust assets for legal expenses, rents, life insurance, travel expenses, and advertising. Additionally, the court required posting of a surety bond against future defalcations, periodic accounting for receipts and expenditures, and disclosure of the books and records of the trust fund and of defendant All State Administrators, Inc.

II. STATUTORY JURISDICTION

The complaint filed below sought to invoke the injurisdiction of the district court pursuant to Sec. 302(e) of the Labor Management Relations Act of 1947 [29 U.S.C. Sec. 186(e)].[4] This subsection provides that the district court shall have jurisdiction to restrain violations of Sec. 302 [29 U.S.C. Sec. 186], which restricts payments or loans by employers to employee representatives, to labor organizations, and to employees in excess of their normal compensation. In thus limiting its judicial function to the grant of injunctive relief against future diversion of trust funds, the district court followed the decisions of four other courts of appeal which have similarly interpreted the jurisdictional grant of Sec. 302(e). *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968); *Moyer v. Kirkpatrick*, 387 F.2d 955 (3rd Cir. 1968), aff'g 265 F.Supp. 348 (E.D. Pa. 1967); *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965); and *Employing Plasterers Ass'n v. Journeymen Plasterers*, 279 F.2d 92 (7th Cir. 1960).

The scope of federal court jurisdiction under Sec. 302(e) is a question of first impression in this circuit. Cf. *Pidgeon v. Brunswick Port Auth.*, 324 F.Supp. 140 (S.D. Ga. 1971). We are persuaded, however, by the weight of reason and authority and by the plain lan-

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[4](e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

guage of the statute that district court jurisdiction under Sec. 302(e) is limited to restraining future violations of the statute and does not include granting relief by way of accounting, receivership, or removal of defalcating trustees or administrators.

Trust funds for the benefit of union members are established under the laws of the respective states. Federal law affects union trust funds only to the extent that Congress has elected to exempt employer contributions to such funds made under the terms of a labor-management contract from the general prohibition on employer payments to employee organizations. While Congress thought it necessary in order to prevent potential abuse of this exemption to stipulate the conditions under which payments can be legally made, State authority remains the legal foundation upon which such funds are constructed. In *Arroyo v. United States*, a case involving a criminal prosecution of a larcenous trustee of a union welfare fund, the Supreme Court described the purposes and the jurisdictional scope of Sec. 302 as follows:

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper

> and expended only for the purposes for which they were established. . . . Continuing compliance with these standards in the administration of welfare funds were made explicitly enforceable in federal district courts by civil proceedings under Sec. 302(e). The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." 359 U.S. 419, 426-27, 79 S.Ct. 864, 868-69, 3 L.Ed.2d 915 (1959).

In actions brought under section 302(e), a district court is in nowise limited in how deeply it may inquire into the structure and the administration of a union welfare trust fund into which employers have made contributions since a detailed study may be necessary to determine whether or not violations of federal law have occurred which would necessitate injunctive relief. However, the federal court's ultimate exercise of adjudicatory power under this section is limited to the prevention of future violations since the Congress, as architect of its jurisdictional gambit, has not chosen to empower it to require an accounting or similar non-injunctive relief. *Blassie v. Kroger Company*, supra, 345 F.2d at 67; *Employing Plasterers Ass'n v. Journeymen Plasterers*, supra, 279 F.2d at 97.

III. PENDENT JURISDICTION

Arroyo and numerous lower court decisions have emphasized that breaches of fiduciary duty by trust-

ees and administrators of union welfare funds constitute violations of state law governing the management of trust property. Pointing out that their complaint stated grounds for relief under state law, the appellants suggest that the district court was empowered to grant the relief sought under the doctrine of pendent jurisdiction.

That we agree with this principle as an abstract assertion does not change the outcome here. Pendent jurisdiction of a federal court to entertain both federal and state claims in a single action exists wherever the relationship between the two claims

> ... permits the conclusion that the entire action before the court comprises but one constitutional "case.". . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. (Emphasis in original.)

United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). See also *Connecticut General Life Ins. Co. v. Craton*, 405 F.2d 41, 48-49 (5th Cir. 1968); *Whirl v. Kern*, 407 F.2d 781, 793 (5th Cir.), cert. denied 393 U.S. 901, 90 S.Ct. 210, 24 L.Ed.2d 177 (1969). The *Gibbs* court distinguished

sharply, however, between the constitutional power to entertain state law claims under pendent jurisdiction and the discretionary exercise of that power.

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims. . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. . . . [I]f it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." 383 U.S. at 726-27, 86 S.Ct. at 1139.

The theory that the doctrine of pendent jurisdiction gives federal district courts plenary authority to adjudicate state law claims in cases involving union welfare trust funds was first suggested by the First Circuit in *Copra v. Suro*, 236 F.2d 107, 116 (1956):

> "In the course of giving an injunction that falls within this narrower scope of Sec. 302(e), the district court can add to its decision, we believe, the resolution of questions, such as those raised in the instant case. . . . [O]nce a *case* is brought clearly within the scope of the Sec. 302(e) jurisdiction, there will not be any serious limitations on the power of the district court, as a court of equity, to dispose of the entire controversy between all the parties who were brought into court because of their interest in the narrower issue." (Emphasis in original.)[8]

The exercise of pendent jurisdiction over state law claims is particularly appropriate in actions brought for injunctive relief under Sec. 302(e) because the state claims based on abuse of welfare trusts are closely tied to questions of federal labor policy. See *Giordani v. Hoffman*, 295 F.Supp. 463, 471-72 (E.D.Pa. 1969); *Insley v. Joyce*, 330 F.Supp. 1228, 1234 (N.D. Ill. 1971).

However, while we believe that the district court could have exercised pendent jurisdiction over all the claims presented in the complaint and considered the propriety of granting any of the types of relief sought which it found appropriate, its refusal to do more than act on the prayer for restraint was a matter of discretion.

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[8]But *cf. Bowers v. Ulpiano Casal, Inc.*, supra, 393 F.2d at 423-24.

We refuse, in this case, to set aside that decision for two reasons. First, it appears that completely adequate state court relief is available to the appellants. Second, the collective bargaining contract and trust agreement which gave rise to this litigation expired on February 28, 1973, long before this case was orally argued before us on May 28, 1973. Except for the accounting, all the relief sought, e.g., setting aside the administrator's contract, appointment of a receiver, and removal of the employer-appointed trustees, was after that date free to be obtained by a new trust arrangement to be worked out between the union and the employers. Accordingly, to that extent those issues are now moot.

IV. ATTORNEYS' FEES

The appellants also appeal from the refusal of the district court to assess costs, including attorneys' fees, against the defendants. Attorneys' fees may, of course, be awarded in the absence of specific statutory authority where a party has by his own effort and expense preserved a fund which benefits others. *Mills v. Electric Auto-Lite*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). In the present case, the appellants obtained a preliminary injunction against improper disbursements of trust funds and compelling disclosure of books and records. However, the election of the appellants as trustees of the fund prior to the initiation of this litigation had the practical effect of terminating questionable disbursements, since from that time they were able to prevent such practices. Likewise, the books and records of the fund were open to inspection and

to audit prior to the initiation of this litigation. As to the further relief sought in regard to the recovery and conservation of trust property, we have, in this opinion, affirmed the district court's order of dismissal. Thus, we find an insufficient connection between the appellants' prosecution of this present action and the preservation of welfare trust funds to require reversal of the district court's decision in regard to costs and counsel fees. Compare *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981, 985-86 (3d Cir. 1970).

CONCLUSION

Since the district court's statutory jurisdiction under Section 302(e) of the Labor Management Relations Act extended only to the granting of injunctive relief, and since its refusal to grant other relief under the doctrine of pendent jurisdiction was in no sense an abuse of its discretion, the order of dismissal is

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3326

FRANCIS SNIDER, ET AL.,
Plaintiffs-Appellants,

versus

ALL STATE ADMINISTRATORS, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

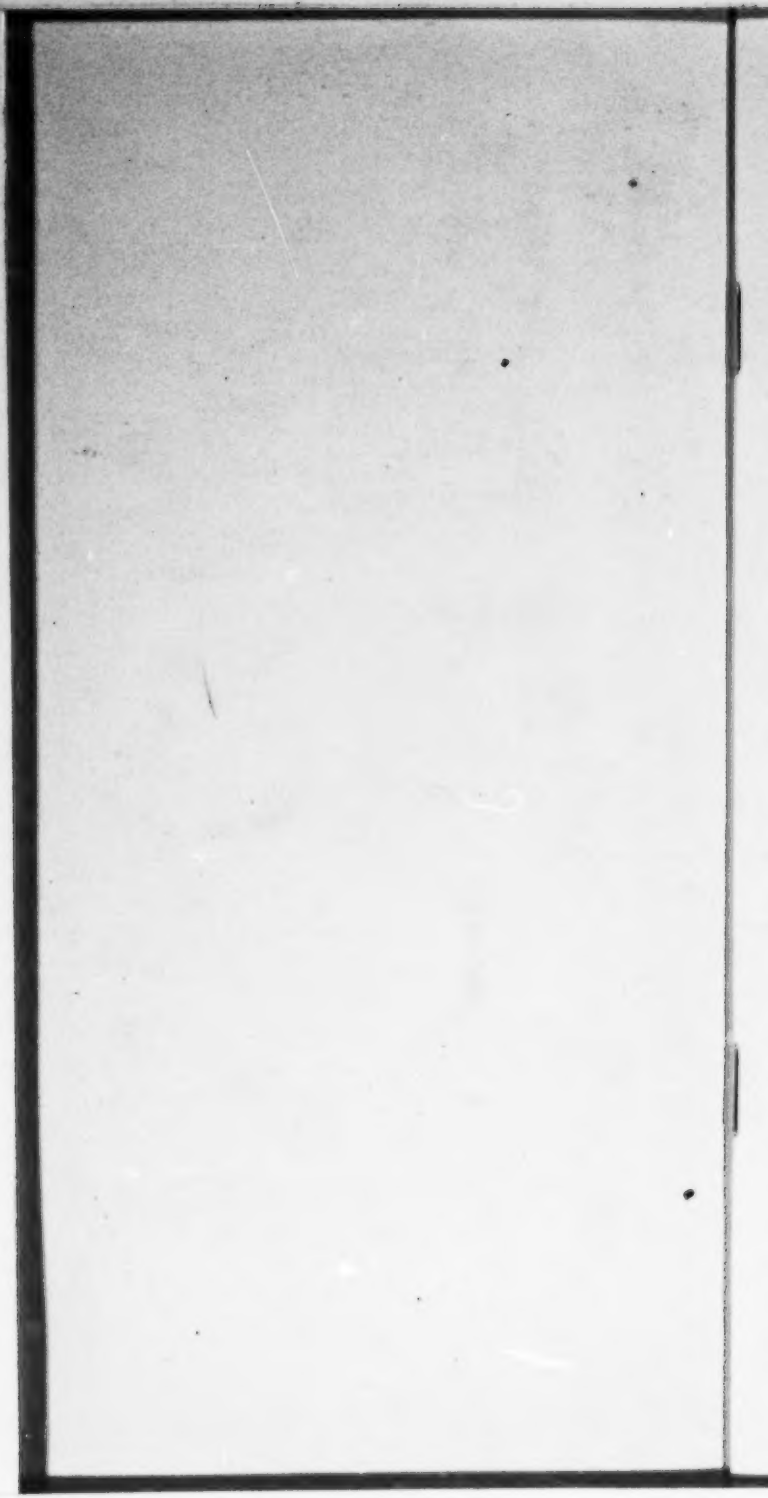
(Opinion July 3, 1973, 5 Cir., 1973, ____ F.2d ____).

(August 15, 1973)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.



SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 3 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1973

NO. 73-731

FRANCIS SNIDER, et al.,

Petitioners,

vs.

ALL STATE ADMINISTRATORS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN M. ROBERTSON
ROBERTSON, WILLIAMS, DUANE AND LEWIS, P.A.
538 East Washington Street
Orlando, Florida 32801
Counsel for Respondents

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QUESTION PRESENTED

Whether Section 302(e) of the National Labor Relations Act, as amended, 29 U.S.C. Section 151, *et seq.*, hereinafter referred to as the "Act", is limited to restraining future violations of the Statute and does not include granting relief by way of accounting, receivership, removal of trustees or administrators for alleged improper acts or omissions, or nullifying a contract between the trustees and the administrators of trust funds.

STATEMENT OF THE CASE

While contract negotiations were underway between Local 15 and a number of bricklaying, masonry, and plastering contractors in the central Florida area, Respondents, GEORGE C. STUART, president of the Plasterers Contractors Association, DON GOAD, business manager of Local 15, and DAVID W. FOLEY, a licensed insurance broker, organized several corporations for the purpose of administering union health and welfare trust funds. The six corporations organized by the Respondents were: All State Administrators, Inc., All State Administrators, Inc. of Orlando, All State Administrators, Inc. of Jacksonville, All State Administrators, Inc. of Miami, All State Administrators, Inc. of Tallahassee and All State Administrators, Inc. of Tampa. The beneficial ownership of the stock in each of the All State corporations was divided among Respondents, STUART, FOLEY, and BILLIE JEAN RHAN, Don Goad's stepdaughter. A seventh corporation, Orange Services, Inc., was organized with the plan that it would eventually serve as a holding company for the other six. The stock of Orange Services, Inc. was held by STUART, RHAN, and JOHN M.

TATE, another insurance broker. These corporations were organized in anticipation that negotiations then underway would result in the establishment of trust funds for which the Respondents, GOAD and STUART, through their respective positions with the union and employers, could control the selection of an administrator.

As a result of the negotiations, Local 15 and the employers' associations entered into two Collective Bargaining Agreement(s), one covering plasterers and the other bricklayers and cement masons, which provided that the employers would pay certain amounts per hour worked by union employees into a Health and Welfare Fund to be established in accordance with Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. Sec. 186. Both Collective Bargaining Agreement(s) were signed by Respondent, DON GOAD, as Business Agent of Local 15. The plasterers' contract was signed on behalf of the employers by Respondent, GEORGE C. STUART, as president of the Plasterers Association, Inc., Orange, Osceola, Lake, and Seminole Counties.

Prior to the effective date of the Collective Bargaining Agreement, Local 15 elected GOAD, and another union member, C. L. DICKSON, as the two trustees to represent the union. STUART selected C. L. McCULLOUGH and W. S. PYNE, both former employees of Stuart's plastering company, as trustee nominees of the employers.

The Petitioners charged that the employers' trustees were handpicked by STUART. The correctness of this contention may be accepted, but by way of explanation, Respondents say that they experienced

difficulty in finding persons willing to serve as trustees because it was a completely thankless job. Naturally trustees representing the employers would not have as keen a personal interest in the administration of the trust as would the trustees of the recipients of the benefits of the fund. It is true that STUART did select those who were closely associated with him. PYNE at the time was working for a contractor who occupied premises at 1 Drennen Drive, the location of the Stuart Plastering business, and McCULLOUGH was an employee of the STUART PLASTERING COMPANY. Before PYNE was asked to serve as a trustee, STUART obtained approval from PYNE's employer concerning the appointment. Even if all formalities had not been complied with, the acts of the employers' representatives were ratified by the employers, who were the only ones responsible for their selection. Such ratification of the selection occurred by the continuing contributions of the employers to the Trust Fund.

Pursuant to the authority conferred upon them under the Trust Agreement, the four trustees selected All State Administrators, Inc. of Orlando as the administrator of the Trust Fund. After All State of Orlando took over administration of the Fund, all monies contributed by employers were deposited in the name of the administrator and expenses of both the Trust and the administrator were paid out of the common fund. Among other expenditures, the administrator paid out of the trust funds the costs and fees, including attorney's fees incident to the incorporation of itself, of the remaining five All State corporations and of Orange Services, Inc. The administrator also used

trust funds to pay premiums on life insurance for its officers, STUART and FOLEY, as well as travel and entertainment expenses unconnected with the purposes of the Trust. Trust funds were likewise used to pay entertainment expenses incident to GOAD's unsuccessful campaign for re-election as Business Manager of Local 15. In addition to these expenditures, which the District Court characterized as an improper diversion of trust funds, All State of Orlando executed a lease with its president, GEORGE C. STUART, for office space in the building occupied by the Stuart Plastering Company and paid the rent under this lease out of the Trust Fund.

Simultaneous with the selection of All State of Orlando as the administrator of the Trust, the trustees signed an Agreement with Aetna Life & Casualty Company to underwrite the Health and Welfare Fund. This policy was placed through Aetna agent, JOHN M. TATE, a stockholder in Orange Services, Inc. TATE agreed to rebate seventy percent (70%) of his commission from Aetna to Respondent FOLEY, stockholder, secretary and a moving party in the organization of the All State corporate family.

The Respondents justified these expenditures on the theory they had a right to use the funds, and even if they did not have such right, All State would receive fees for its services as administrator, out of which could be returned the improperly diverted funds of the Trust. Quite naturally this brought about dissension and discontent among some members of the union, including the Petitioners.

At trial in the District Court, the Respondents offered to pay back all funds which had been improperly

expended, without admitting that there had been any intentional wrongdoing on their part with respect to such expenditures.

As a result of the union members' discontent with the management of their Trust Fund, GOAD and DICKSON were removed as union trustees and replaced by FRANCIS SNIDER and GUY ASHCRAFT. Following an audit of the Trust Fund, SNIDER and ASHCRAFT initiated the action on behalf of themselves and other members of Local 15. The Complaint prayed for immediate injunctive relief against the improper disbursement of trust funds, for nullication of the contract between the administrator and the trustees, an accounting, an appointment of a receiver and removal of the administrators.

The Respondents specifically take issue with that part of the Petitioners' "Statement of the Case" which attempts to present to this Court matters which are not part of the Record on Appeal. While they attempt to persuade this Court to grant certiorari by including such matters, they fail to point out the Respondents performed their duties, albeit with some mistakes, for a period of four (4) years and have never been paid any fee for their services due to the Petitioners' refusal to pay any fee whatsoever.

REASONS FOR DENYING THE WRIT

I

THE DECISION BELOW, BY THE WEIGHT OF REASON AND AUTHORITY AND BY THE PLAIN LANGUAGE OF THE STATUTE, IS CORRECT AND ADOPTS A DECISION OF THE SUPREME COURT OF THE UNITED STATES.

(References to the portions of the Judgments below are included in the Appendix to the Petitioners' Petition and will be referred to as "Pet.App.; page_____".)

There is no question as to the fact that the plain language of the Act limits the jurisdiction of the District Courts under Section 302(e) to restraining future violations of the Statute and does not include granting relief by way of accounting, receivership, removing trustees or administrators or voiding contracts with administrators. In *Arroyo v. United States*, 359 U.S. 419, 79 S.Ct. 864 (1959) the Supreme Court of the United States described the purposes and the jurisdictional scope of Section 302 as follows:

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered prop-

> er and expended only for the purposes for which they were established . . . Continuing compliance with these standards in the administration of welfare funds were made explicitly enforceable in federal district courts by civil proceedings under Sec. 302(e). The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." 359 U.S. 419, 426-27, 79 S.Ct. 864, 868-69. 3 L.Ed. 2d 915 (1959)

The Court of Appeals for the Fifth Circuit in its opinion in this case pointed out that the laws of the respective states regulate trust funds for the benefit of union members. While Congress did enter the field to regulate the Congressionally created exemption of allowing an employer to make contributions to such funds to avoid abuse of the exemption, state authority remains the legal foundation upon which such funds are constructed. (Pet.App.; page 46)

Numerous decisions have examined the jurisdiction of the Federal Courts in cases of this nature. The decisions have generally held that under the *Welfare and Pension Plans Disclosure Act*, U.S.C.A. Section 301, the Statute is confined to a disclosure and reporting function and does not confer jurisdiction on the Federal Court to supervise or regulate internal administration on welfare and pension funds. The Courts have also considered jurisdiction under Title 29, *LMRA*, Section 302, and have held that the jurisdiction of the Courts under this Act does not extend to granting the relief prayed for in the Petitioners' Complaint.

Moyer vs. Kirkpatrick, 265 F. Supp. 348 (U.S.D.C. Penn. 1967) affirmed 387 F.2d 955 (3rd C.C.A. 1968) was an action by union members against the trustees of a health and welfare fund. The Complaint alleged that the trustees were acting improperly and in breach of their fiduciary duties by refusing to accept payments from certain employers, thereby denying the Plaintiffs benefits to which they would otherwise be entitled. The Defendants filed Motions to Dismiss the Complaint for lack of jurisdiction and for failure to state a claim under which relief can be granted. The Court held that the Motion to Dismiss must be granted on both grounds. The Third Circuit Court of Appeal affirmed on the basis of the lower court's opinion. The lower court, in discussing the matter of jurisdiction, held that Court review of business judgments of trustees and administrators of trust funds are not conferred by the *Disclosure Act*, nor may it be reasonably implied therefrom. The Statute is limited to a disclosure and reporting function. The Court also held that *LMRA* does not confer jurisdiction in the Federal Court to regulate the administration of such funds.

The case of *Bowers vs. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st C.C.A. 1968) involved alleged wrongful diversion and misappropriation of welfare and pension funds. The appeal resulted from a dismissal of the Plaintiff's Complaint. The lower court was affirmed on the grounds that the Federal Court lacked jurisdiction. The Court noted that the Statutes giving the Federal Courts jurisdiction permits injunctive relief only against future diversions of funds, which are also crimes, and does not afford even injunctive relief against violations of fiduciary obligations or stan-

dards of prudence in administration of the trust funds. The Court noted that the provisions of *LMRA*, Section 302(e), 29 U.S.C.A. Section 186(e) are not the "fundation stone" for Federal Court management of trust funds.

The case of *Employing Plasterers' Assoc. of Chicago vs. Journeymen Plasterers Protective and Benevolent Society of Chicago, Local No. 5*, 279 F.2d 92 (7th C.C.A. 1960) is one of the leading cases on point. This case involved an appeal from an order of the lower court dismissing the Complaint of the Plaintiffs. The Court summarized the Complaint of the Plaintiffs, at page 95, as follows:

> "The Complaint herein alleged that defendants are "representatives" of employees; that they are receiving contributions from employers for the purpose of providing employee welfare benefits; that the contributed funds are not administered in accordance with Section 302; and that said contributions are, therefore, in violation of Section 302 (a-g). In addition, there is alleged the unauthorized disbursement of said funds."
>
> "The Association demands that violations of Section 302 be enjoined by restraining defendants from demanding, coercing, and accepting employer contributions, and from making further disbursements of money now in possession of the Institute. The Association also asks for the appointment of a receiver in respect to said funds and for an accounting of receipts and disbursements of employer con-

tributions from date of the inception of the Institute."

The Court reversed the dismissal of the Complaint for lack of jurisdiction on the ground that the Federal Courts do have the limited jurisdiction to enjoin future misappropriation of trust funds, but that the jurisdiction extends no further. The Court also noted that an action does lie for the misuse of trust funds, but that such action properly lies in the *State* Courts, and that no jurisdiction is conferred on the Federal Courts to grant such relief. The Court noted, on page 97 of its opinion, as follows:

> "Employees have a primary, if not exclusive, right to bring an action for injunction, receivership, and accounting based on alleged misuse of funds held in trust for their benefit. Such an action may properly lie in the State Courts under established principles of equity. The Labor-Management Relations Act does not create jurisdiction in the Federal Court to entertain employees' claims based solely on the alleged diversion or conversion of their welfare funds."

> "Section 302 is aimed primarily at the prevention of possible abuse and not at providing a remedy for abuse actually perpetrated."

In the case of *Kroger Co. vs. Blassie*, 225 F.Supp. 300 (U.S.D.C. Mo. 1964) an action was brought for the determination of whether or not a welfare trust met the Federal Statutory requirements and seeking an injunction against future violations. The Court entered its Order enjoining certain future actions of the

trustees. However, with regard to the issue of jurisdiction beyond this limited future injunction, the Court noted, at page 312 of its Opinion, that the Plaintiffs challenged various acts of the trustees and sought to envoke the more general equity powers of the Court over welfare funds. The Court noted, at page 313, as follows:

> "It would seem to this court that the Supreme Court clearly indicates that while activities in the day to day administration of the trust may be subject to control by the courts, that it is the state courts, who from day to day deal with the administration of trust funds, in trusts of all kinds, description and character, who must deal with those activities in trusts of this type. It is this Court's opinion that 29 U.S.C.A. §186 is aimed primarily at the prevention of possible abuse and not at providing a remedy for abuse actually perpetrated in the operation of the trust. The Act grants jurisdiction to district courts to enjoin violation of 29 U.S.C.A. §186 A and B. Nothing is mentioned about giving federal courts jurisdiction over welfare trusts and trustees except where violations of the Act occur. If the conduct is legal under the Act, then this Court has no jurisdiction, but rather, jurisdiction is that of a state court."

In this case, the Plaintiffs also contended that the Defendants should be permanently enjoined from acting as trustees of the funds. The Court, in *Kroger, supra,* noted that it did not have authority to enter such an order, stating, at page 314, as follows:

"The reason is that, as previously stated, the court is of the opinion that the federal district courts do not have the jurisdiction to review the administration of a welfare trust except where violation of the Act occurs, because such matters are not violations from the Act, but fall within the activities of the day-to-day administrations of the trust. In view of this finding by the court, it would serve no useful purpose for this court to discuss matters pertaining to administration of the trust, for those are matters for a state court's consideration."

The case of *Holton vs. McFarland*, 215 F.Supp. 272 (U.S.D.C. Alaska, 1963) also supports the foregoing statements of law.

Accordingly, the Respondents respectfully submit the District Court properly ruled that it lacked jurisdiction over this action, except for the limited purposes of requiring the Defendants to make a complete disclosure and to enjoin any further misappropriation of funds from the trustees. The trial court found that this had been done and had fully accomplished the purpose. The relief sought by the Plaintiffs must be obtained in the State Courts and not in the Federal Courts.

The Respondents dispute the claim of the Petitioners that it is a Federal Statute which gives breath to a trust fund and prescribes the manner in which the fringe benefit program is to be created. Trust funds for the benefit of union members are established under the laws of respective states. The Act does not prescribe, but proscribes. It limits the way in which

employers can make contributions to such funds. Without the creation of trust funds under state law there would be no need for the enactment of the Act itself. Just because Congress recognized the fact that trust funds exist and saw a need to avoid an abuse of those funds does not mean that the Federal Courts now have jurisdiction over any problems which arise pertaining to trust funds. If Congress intended the Act to preempt the field in trust administration problems they would have done so when the Act was created. Congress went far enough to allow the District Courts to enter injunctions against any further improper expenditures from trust funds with knowledge that state laws provided for the manner in which the funds must be administered and penalties for failure to do so.

> "The legislative history (of Section 302(e)) is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." *Arroyo, supra.*

In effect, the Petitioners are attempting to make a Federal case out of what is a state court case. The purpose of congressional action in passing the Act was to prevent potential abuse of the exemption allowing employers to contribute to trust funds by means of an injunction. Once an injunction is granted, as it was in this case, any further abuse is stopped and then the Petitioners can litigate any claims which arose prior to the injunction in the state courts under whose laws the funds were created without fear of any further wrongdoing by the alleged defalcators.

POINT II

ASSUMING ARGUENDO THAT THE COURT HAD JURISDICTION OVER MATTERS OTHER THAN REQUIRING AN ACCOUNTING AND ISSUING AN INJUNCTION, THE PETITIONERS FAILED TO PROVE THE ESSENTIAL ELEMENTS NECESSARY FOR THE RELIEF SOUGHT.

The trial court, after consideration of the evidence, made extensive findings of fact and law in this cause. (Pet.App.; page 10-30) The Court found from the evidence that the Trust Agreement met the legal requirements and that there was nothing in violation of the law or the agreement itself in the manner in which the trustees were selected. (Pet.App.; page 20-22) The Court also found that the contract between the Administrator and the trustees was executed in accordance with the testimony given by the Respondents and that the trustees had authority to execute the contract. (Pet.App.; page 21) The Court further ruled that the union did not have standing to object to the manner in which the trustees were selected and had, in fact, violated the Statute and the agreement themselves. (Pet.App.; pages 22 and 27)

The Court then examined each of the prayers for relief sought in the Complaint. First, the Court noted that an injunction was sought and that one had been granted and had served its purpose. (Pet.App.; page 23) Secondly, the Court was asked to nullify the contract between the administrator and the trustees. The Court specifically ruled that there was no basis in fact or law to grant such relief. (Pet. App.; page 24)

Thirdly, the Plaintiffs asked for the appointment of another administrator. Again, the Court specifically ruled that there was no showing of necessity for such an order based upon the facts, even if the Court had jurisdiction. (Pet.App.; page 25) Fourth, the Petitioners asked for an accounting and the Court correctly noted that a full accounting had been rendered and that, in fact, the books and records had always been available. (Pet.App.; pages 26 and 28) Fifth, the Petitioners sought the removal of all of the Defendants from any connection with the trust. The Court correctly noted that labor had already changed its trustees, that the Contract Administrator was not a party to the suit, and that there was no basis in fact for the trustees' removal. (Pet.App.; pages 26, 23 and 24) The Court noted that there was no evidence that the trustees had not conscientiously carried forward their duties since the entry of the restraining order. (Pet.App.; page 27) The Court further found that the Petitioners themselves had not complied with the Statute or the Trust Agreement and could not complain. (Pet.App.; page 27)

Thus, the trial court did consider each of the Petitioners' claims on the merits and found against them, both on the facts and the law, despite the fact that the Court also noted that it did not have jurisdiction to grant much of the relief sought. In Rule 52(a) of the Federal Rules of Civil Procedure, it is provided that findings of fact by the Court in actions tried without a jury ". . . will not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

Findings have been held not to be "clearly erroneous" unless (1) the findings are without substantial evidence to support them, (2) the Court misapprehended the effect of the evidence, or (3) even if there is substantial evidence, the evidence as a whole is so against the great preponderance of the evidence that it does not reflect the truth or right of the case. *Western Cottonoil Co. vs. Hodges*, 218 F.2d 158 (C.A. 5th 1954).

In the case at bar, Petitioners' brief is replete with conclusions, accusations and cliches, with little or no factual relation to the actual record in this cause.

It is respectfully submitted that the Petitioners have failed to demonstrate that the findings of fact by the trial court were clearly erroneous under the test set forth in *Western Cottonoil* and accordingly, the trial court should be affirmed, and the Petition for Certiorari denied.

CONCLUSION

The Petition for Certiorari should be denied on the grounds that:

1. The Court lacked jurisdiction to grant the relief requested except for the reporting and injunctive powers.

2. The Court did consider the relief sought by the Plaintiffs on the merits and found as a matter of law and based upon the facts of the case that the Plaintiffs were not entitled to the relief sought. There has been no showing that said findings of fact were clearly erroneous.

Respectfully submitted,

JOHN M. ROBERTSON
ROBERTSON, WILLIAMS,
DUANE AND LEWIS, P.A.
538 East Washington Street
Orlando, Florida 32801

SNIDER ET AL. *v.* ALL STATE ADMINISTRATORS, INC., ET AL.

ON MOTION TO DISPENSE WITH PRINTING THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–731. Decided January 21, 1974

Motion to dispense with printing petition for certiorari as required by this Court's Rule 39, which motion is supported by only generalized allegations of inability to afford payment of costs of printing (as that term is defined in the Rule) but that does not comply with Rule 53 governing *in forma pauperis* proceedings, is disfavored, the Court not being disposed to waive the functional standards established by Rule 39.

Motion denied; see 481 F. 2d 387.

PER CURIAM.

Petitioner Snider has filed a motion to dispense with the printing of the petition for certiorari as required by our Rule 39. He has filed no motion and affidavit in conformity with our Rule 53, dealing with proceedings *in forma pauperis*. While we undoubtedly have authority to waive the application of particular rules in appropriate circumstances, we have during this Term denied a considerable number of similar motions.* Typically in each of these cases the moving petitioner made generalized allegations of inability to afford payment of printing costs, but made no showing sufficient to comply with Rule 53 governing proceedings *in forma pauperis*. Motions such as these are disfavored, and petitioner's motion is denied.

* See, *e. g.*, *Wallace* v. *Smith*, No. 73–40, motion denied October 15, 1973, *post*, p. 907; *Broccolino* v. *Maryland Comm'n on Judicial Disabilities*, No. 73–431, motion denied November 19, 1973, *post*, p. 1038; *Chippas* v. *United States*, No. 73–761, motion denied December 17, 1973, *post*, p. 1109. See also *Morton* v. *Mancari*, No. 73–362, motion to dispense with printing the motion to dismiss or affirm denied January 14, 1974, *post*, p. 1142.

Rule 39, entitled "Form of appendices, petitions, briefs, etc.," contains the following definition:

> "Printing, as the term is used in these rules, shall include any process capable of producing a clear black image on white paper but shall not include ordinary carbon copies. If papers are filed in a form which is not clearly legible, the clerk will require that new copies be substituted, but the filing shall not thereby be deemed untimely."

We think it is clear from this definition, and from the other parts of Rule 39, that documents governed by Rule 39 need not have been imprinted on a press in order to comply with its terms. They are required to be the product of a process "capable of producing a clear black image on white paper," and to conform to the paper-size, binding, and type-size requirements also set forth in the Rule. The Rule is thus functional in nature, and is designed to assure the Court that appendices, petitions, briefs, and the like which are subject to its provisions will be of uniform size and good legibility. We are not disposed to waive these standards.

In future cases, the Clerk will be instructed not to accept for record a petition for certiorari or other document which is subject to Rule 39 and fails to conform to the requirements of that Rule, and to submit only the motion to dispense with printing to the Court for decision. In the event such motion is denied, the petition or other document will be returned to the party seeking to file it at the time the order of denial is entered.

Petitioner's motion to dispense with printing the petition for certiorari in this case is denied. Because our view as to the probable fate of motions such as his may not heretofore have been apparent to the Bar, he is granted 21 days from the entry of this order in which to file a petition which conforms to Rule 39.

Reporter's Note

Orders of January 7, 1974, begin with page 1117. The preceding orders in 414 U. S., from July 26 through December 20, 1973, were reported in Parts 1 and 2, at 801–1117. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.